


# Council of the District of Columbia Report

441 Fourth Street, N.W. Washington, D.C. 20001

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To: All Councilmembers

From: Kathy Patterson, Chairperson, Committee on Government Operations 

Date: October 31, 2000

Subject: Bill 13-829, the "Freedom of Information Amendment Act of 2000"

The Committee on Government Operations, to which Bill 13-829, the "Freedom of Information Amendment Act of 2000," was referred, reports favorably on the legislation and recommends adoption by the Council of the District of Columbia.

## **PURPOSE AND EFFECT**

Bill 13-829 amends the District of Columbia Administrative Procedure Act of 1968 (82 Stat. 1204; D.C. Code § 1-1502) and the District of Columbia Administrative Procedure Act of 1977 (D.C. Law 1-96; D.C. Code § 1-1521). The Freedom of Information Act states: "the public policy of the District of Columbia is that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." Provisions of the District's Freedom of Information Act (FOIA) "shall be construed with the view toward expansion of public access and the minimization of costs and time delays to persons requesting information."

Bill 13-829, in keeping with the general purpose of FOIA, is intended to provide the public greater access to information, improve the effectiveness of the law, and encourage better government responsiveness to requests for public records. The amendments are founded on the belief that open access to information, with limited exceptions, is crucial to promoting responsibility and accountability in government. Bill 13-829 proposes several changes to FOIA that are consistent with these goals, and with recent actions taken in other states and in Congress.

First, Bill 13-829 expands the law to cover electronic records, and requires public bodies to make reasonable efforts to provide documents in the form or format requested. These changes are consistent with the 1996 Electronic Freedom of Information Act Amendments to federal law ("E-FOIA") and court decisions. The legislation should change to reflect the changes in

technology, and promote user-friendly methods of making information available to the public.

Second, the proposed legislation extends coverage to public bodies, defined as the Mayor, an agency, or the Council of the District of Columbia, whereas current law applies only to the Mayor and agencies. When Congress enacted the federal FOIA in 1966, it chose to exempt itself, and the District law was modeled on the federal law. Since 1966, several states have decided to explicitly include the legislative branch under their state counterparts to FOIA. As a practical matter, most legislative documents are currently public records, and it has been the practice of the Council to abide by the requirements of FOIA. Nevertheless, it is only fair for the Council to abide by the same rules as the executive branch with respect to public access to information.

Third, the amendments extend coverage to contractors performing government functions, and closes this loophole that has developed in the law as the trend toward outsourcing of government services continues. This change responds to a common complaint from human service program advocates and others, and is consistent with actions taken in 22 other states. The provision regarding private contractors has been revised since Bill 13-829 was introduced in order to narrow the scope of the requirement to contractors that "perform a government function," rather than merely provide some type of service to the government. The new provision also clarifies that the public body with oversight responsibility for the contractor is responsible for making the records available to the public, and therefore, for the costs associated with compliance with the law.

Fourth, Bill 13-829 provides penalties for arbitrary and capricious violations of the law, including a fine of \$100 and administrative penalties to be incorporated in the District of Columbia Personnel Regulations. These penalties are intended as a reasonable approach to increase compliance with the law, and are consistent with a majority of other states that already have statutes imposing some type of penalty for violations of open records laws.

Fifth, the legislation requires all Freedom of Information Officers, newly appointed by the Mayor, to receive a minimum of 8 hours of training regarding implementation and compliance with the act. This provision was added to Bill 13-829 following the public hearing on October 12, 2000, and it was one of the most frequently recommended changes to improve the legislation.

Sixth, the proposed amendments clarify that a written request for information is unnecessary when the information is specifically required to be made public. This section has been expanded to include records that have been released and are likely to be requested in the future, and an index of all records that are available under the section. Additionally, Bill 13-829 states that information that is required to be made public under this section must be available on the internet or by other electronic means by November 1, 2001.

Seventh, the proposed legislation includes several minor changes to current requirements, including disclosure requirements for partially released documents and annual reporting requirements. These changes are consistent with the 1996 federal E-FOIA.

Finally, Bill 13-829 provides new requirements for maintenance and disposal of records filed with the Office of Campaign Finance (OCF). Current law requires OCF to keep all papers and reports filed pursuant to the Campaign Finance Act for four years, and then to return those papers and reports to the individual concerned or his or her representative. This requirement is infeasible because of the sheer volume of papers and reports that the Office of Campaign Finance has to send back. In a September 29, 2000, letter to the Committee Chairperson, OCF Director Cecily Collier-Montgomery stated that "On the occasions that OCF attempted to return the statements, more often than not, the mail was returned to OCF for lack of current addresses or expired forwarding orders." Bill 13-829 deletes both of the statutory provisions that require OCF to send back papers and reports after four years, and adds new language requiring OCF to maintain and dispose of these records in accordance with the District of Columbia Public Records Management Act of 1985. The Act requires the District's Public Records Administrator to create guidelines for the preservation and destruction, when appropriate, of public records.

### **LEGISLATIVE HISTORY**

<b>DATE</b>	<b>ACTION</b>
September 19, 2000	Introduction of Bill 13-829 by Councilmember Patterson, and co-sponsored by Councilmembers Ambrose, Brazil, Mendelson, and Schwartz. (Attachment A).
September 20, 2000	Referral of Bill 13-829 to the Committee on Government Operations.
October 12, 2000	Public Hearing on Bill 13-829 held by the Committee on Government Operations.
October 31, 2000	Consideration and vote on Bill 13-829 by the Committee on Government Operations.

### **BACKGROUND AND NEED**

In preparation for the Committee on Government Operations public hearing on October 12, 2000, Committee staff conducted a mini-audit of District agencies to test responsiveness to requests for public documents. (Attachment B). A Committee staff member visited six District agencies and requested documents that should be available to the public upon request without filing a formal FOIA request. The agencies involved in the audit include the Department of Motor Vehicles, Board of Nursing Home Administrators, Metropolitan Police Department (Indiana Avenue and the 2nd District), Alcoholic Beverage Control Board, Fire and Emergency Medical Services Department, and Department of Public Works.

Only DPW and Fire and EMS provided reasonably ready access to documents while staff at other agencies declined for various reasons to provide access to or copies of requested

documents. In most instances, District agency staff required the Committee researcher to show identification and explain the purpose of the request, and indicated that filing a formal FOIA request would be required to obtain the information. Although this mini-audit was neither comprehensive nor scientific, it demonstrated that too often front line government workers simply aren't aware that the public has a clear right to public documents.

The Williams Administration is firmly on record in support of open access to government information. Mayor Williams issued a Mayor's order on August 25, stating "it has been and continues to be the policy of the District Government to increase and improve the access that our citizens have to this Government's information. That policy must include greatly increased public access to information requested under the FOIA as well as practices that encourage and facilitate citizen access to information without the necessity of requesting information under FOIA."

In July, Mayor Williams issued a memorandum requiring agencies to designate a FOIA officer (Attachment D), and the Council this year received annual reports from agencies for the first time in recent memory. A breakdown of the agency FOIA data is included in a summary chart as Attachment E. While there is some question as to the reliability of some of the data provided by the agencies, the current reports are a good sign of progress and good evidence of the administration's commitment on this issue. The amendments proposed in Bill 13-829 are necessary steps to achieve further progress in the District's pursuit of the goals of the Freedom of Information Act.

### **IMPACT ON EXISTING LAW**

Bill 13-829 will not effect any other existing law in the D.C. Code.

### **SECTION-BY-SECTION ANALYSIS**

Section 1 states the long and short titles of Bill 13-829.

Section 2 amends the District of Columbia Administrative Procedure Act of 1968 (82 Stat. 1204; D.C. Code § 1-1502). The term "public record" is amended to include "information stored in an electronic format," and the term "public body" is added to extend coverage to the Council. Bill 13-829 as introduced included a provision that defined records maintained by private contractors as public records, but this provision has been modified and moved to Section 3. The phrase "any interstate compact agency" was deleted from the term "public body" during the Committee meeting on October 31.

Section 3 amends the District of Columbia Administrative Procedure Act of 1977 (D.C. Law 1-96; D.C. Code § 1-1521). The term "public body" is added and the term "Mayor or an agency" is deleted throughout the act, in order to extend the coverage of FOIA to include the Council. Additionally, Sections 202, 204, 206, 207, and 208 are amended to make a variety of

changes to the Freedom of Information Act.

Section 202 is amended to require that public bodies make reasonable efforts to provide documents in the form or format requested. "Reasonable efforts" are defined to require that no more than 8 hours of personnel time be spent to reprogram or reformat records. This definition was not included in Bill 13-829 as introduced, but has been added at the recommendation of the Office of Information and Privacy at the U.S. Department of Justice because courts have interpreted "reasonable efforts" very broadly. This section was amended by Councilmember Schwartz during the Committee mark-up to require the person requesting information to pay the costs of reproduction.

Section 202 also extends coverage to private contractors performing government functions, and specifies that the public body with oversight responsibility for the contractor is responsible for making records available to the public. This provision has been modified and narrowed since the legislation was introduced in response to several concerns raised by private firms that provide service to the government. The new provision is designed to clarify that the government is responsible for compliance with the law, and for the costs associated with responding to requests for information. Additionally, the new version does not apply to every company that provides service to the District, but only those contractors that perform government functions. This change is intended to cover private contractors that provide goods or services that were previously provided by the government, but have been contracted out to private entities. The Community Partnership for the Prevention of Homelessness is the type of contractor that the new provision is intended to cover. This section was also amended at the Committee mark-up, and Councilmember Patterson amended the term "oversight responsibility" to "programmatic responsibility." This change was made in order to clarify that the Office of Contracts and Procurement is not responsible for handling all FOIA requests for information with respect to private contractors.

Section 204 is amended to provide disclosure requirements for partially released documents.

Section 206 is amended to specify information that must be made public, and does not require a written FOIA request. This section has been expanded to include records that have been released and are likely to be requested in the future, and an index of all records that are available under the section. Section 206 has also been amended to require records created on or after November 1, 2001 be available on the internet or by other electronic means.

Section 207 is amended to provide penalties for arbitrary or capricious violations of the act, including a \$100 fine. Bill 13-829 as introduced included a \$100 fine for "knowing and willful" violations of the act, but has been changed in response to concerns raised by the Office of Information and Privacy with the U.S. Department of Justice and the Office of Corporation Counsel. Also, a new provision has been added that places responsibility for compliance with FOIA on all employees, and requires this responsibility be incorporated in the D.C. Personnel

Regulations. This language is added both to underscore the importance of all District employees respecting the public's right to information and with the intent that an administrative penalty should be imposed for violations of the act.

Section 208 revises the annual reporting requirements to include, among other data, information regarding the amount of time spent processing requests and a summary statement with conclusions drawn from the data cited in the report. Additionally, this section is amended to require that as of November 1, 2001, Freedom of Information Officers receive a minimum of 8 hours of training following their appointment. These changes were strongly recommended by witnesses at the public hearing held by the Committee on October 12, 2000.

Section 4 amends the District of Columbia Campaign Finance Reform and Conflict of Interest Act of 1974 (88 Stat. 467; D.C. Code § 1-1462) to provide new requirements for maintenance and disposal of records filed with the Office of Campaign Finance.

Section 5 describes the projected fiscal impact of Bill 13-829.

Section 6 establishes the effective date for Bill 13-829.

### **FISCAL IMPACT**

The Committee finds that Bill 13-829 will have no fiscal impact on the FY 2001 budget. The Office of the Chief Financial Officer is preparing a fiscal impact statement for the impact on the FY 2002 budget and later years. Two aspects of this legislation will have a fiscal impact, including 1) the requirement that records that are specifically made public information must be available through the internet or by other electronic means, and 2) an 8 hour minimum training requirement for newly appointed Freedom of Information officers. These provisions will take effect after November 1, 2001, providing ample time for the FY 2002 budget to incorporate any additional costs.

### **PUBLIC HEARING**

The Committee on Government Operations held a public hearing on Bill 13-829 on October 12, 2000. Six panels of witnesses testified at the hearing, including a historical panel, a practical issues panel, a press panel, a reform legislation panel, a panel representing the executive branch, and a panel of two public witnesses.

**Historical Panel:** The first panel was composed of three witnesses, who testified primarily on the historical development of the Freedom of Information Act and the underlying purpose or principles of the law.

1.) **Paul McMasters, Freedom Forum, First Amendment Ombudsman**, testified to the historical development of open records laws dating back to 1936 and up to the present day.

He noted that the original purposes of the 1966 federal FOIA were to make public officials accountable to the public, encourage citizen participation in governance, and to enhance public confidence in government. Mr. McMasters also noted that some of the concerns with FOIA included protecting individual privacy, maintaining the integrity of law enforcement, costs of implementation, and inconvenience or embarrassment of government officials.

According to Mr. McMasters, open government is a work in progress, and there are ten principles he believes should be embedded in the legislation. These principles include:

1. The law should emphasize a presumption of openness.
2. The law should define access broadly and positively.
3. Exemptions should be permissive, rather than mandatory. They should be kept to an absolute minimum. They should be narrowly defined. Barriers against exceptions in other laws must be erected.
4. The law should provide for administrative appeal and judicial review. Both *de novo* and *in camera* review should be specified to make sure that delay and denial are independently and completely reviewed.
5. The decision to provide records should be based on the nature of the records, not the identity or purpose of the requesters.
6. Agencies and employees should be directed to be aggressive and proactive in disseminating information and making access simple.
7. Electronic technology should be exploited to gather, manage and disseminate information; it should be requester-friendly.
8. There should be expeditious processing of requests for records. Multi-tracking and other systems for moving requests along should be encouraged.
9. There should be incentives for agencies and employees to provide records and make them more accessible; there should be fines or other penalties for agencies or employees who wrongfully delay or deny access.
10. Agencies should be required to report on disposition of records requests. The legislative branch should hold regular and careful oversight hearings on the law's implementation and execution.

2.) **Benny Kass, Former Counsel to Representative John Moss**, testified to the factors that led Congressman Moss to introduce the federal Freedom of Information Act, including his belief that information is a major resource, and a well-informed citizenry is necessary for a strong democracy. Congressman Moss modeled the legislation on a book called the "People's Right to Know," and the first draft of the federal FOIA provided only three exemptions to public information, including national security, privacy, and those exemptions authorized by statute. These three exemptions expanded to nine in the final version of the federal FOIA, and this structure was later adopted by the District of Columbia.

Mr. Kass noted some examples of the ongoing "silly secrecy" of government, despite the passage of the legislation. One particularly egregious example involved the withholding of an

issue of Business Week magazine because it contained classified information.

Mr. Kass expressed one reservation about Bill 13-829, and noted that the penalty provision may be difficult to enforce. He asked whether the penalty provision will lead the Office of Corporation Counsel to impose fines upon itself, and stated his belief that the "white spotlight of publicity" is the best method of enforcement.

3.) **Roderic Woodson, Holland & Knight**, has experience teaching administrative law and practice, and was formerly an FOI officer for the Securities & Exchange Commission. Mr. Woodson focused his testimony on Bill 13-829, and expressed his opposition to the provisions regarding private contractors and criminal penalties for violations of the law. Additionally, Mr. Woodson objected to the perceived requirements to produce or create new documents other than those documents that already exist. He expressed his belief that these requirements are burdensome and go beyond the purpose of FOIA.

Councilmember Patterson asked how the panelists recommend the government improve the implementation of FOIA, and suggestions included periodic oversight hearings, designation of FOI officers at agencies, and creation of incentives for compliance with the law. Additionally, Councilmember Patterson noted Mr. Woodson's concern about placing burdens on private contractors, and suggested the onus could be placed on the government FOI officer to respond to requests as a solution. Mr. Woodson stated that the Council should distinguish between contractors performing government functions that have been outsourced and private companies that provide a service to the government, such as the phone company. He argued that this latter category of private companies and service providers should be exempt from Bill 13-829.

**Practical Issues Panel:** The second panel was composed of four witnesses, all of whom had experienced difficulties trying to obtain information from the District government.

1.) **Brian Gilmore, Washington Legal Clinic for the Homeless**, testified in support of Bill 13-829, particularly the provision extending coverage of FOIA to private contractors. Mr. Gilmore described how his organization has been denied access to information by the Community Partnership for the Prevention of Homelessness, a city contractor that provides services to the homeless on behalf of the government. He explained the need for an amendment to include such contractors under FOIA, stating:

"Increasingly, as more and more governmental functions get contracted out to private entities in the future, it will become even more important for the public to be able to obtain information regarding the use of taxpayer funds by contractors under the well established rules of the Freedom of Information Act."

2.) **Dorothy Brizill, Executive Director of D.C. Watch**, testified to the closed nature of the District government, and the failure of the Williams administration to uphold the principle that government information is public information. Ms. Brizill noted that FOIA is used by

District employees as an obstacle, or a hoop to jump through, rather than as a tool to promote open access to information. She argued that FOIA should be used as a last resort, not a routine procedure.

Ms. Brizill expressed support for Bill 13-829, and her belief that FOIA should cover all entities that receive public funds. In response to a question from Councilmember Patterson, Ms. Brizill stated that the Board of Elections is one example of an agency that does a good job providing information to the public. Generally speaking, however, she believes the District government's compliance with FOIA is getting worse, rather than better.

3.) **Nick Keenan, resident of Shaw**, testified that FOIA does not work to provide information to the public. Mr. Keenan has filed three FOIA requests, two to D.C. Public Schools (DCPS) and one to the Department of Consumer and Regulatory Affairs (DCRA), and has not received any response from either agency. (Note: DCRA did not submit an annual FOIA report, and DCPS claimed to have granted, in whole or in part, all requests submitted. Mr. Keenan's testimony refutes the accuracy of the DCPS report.) Mr. Keenan stated, "Neither the spirit nor the letter of the law is being followed. Essential information about the workings of government, that the public paid for, is not available to the public."

4.) **Chris Frates, student, University of Maryland**. As part of a class project, Mr. Frates requested an electronic database of the District's small and disadvantaged business list. The Office of Local Business Development did not provide him with the information despite a request made by telephone and the filing a written request.

**Press Panel:** The third panel included testimony from five witnesses representing various local and national newspapers and the Maryland, Delaware, D.C. Press Association.

1.) **Carol Melamed, Vice President for Government Affairs, The Washington Post**, testified in support of Bill 13-829 and described the newsroom's experience seeking records under the current DC-FOIA. Ms. Melamed noted that FOIA applies equally to all persons, and the press has no special rights, nor any lesser rights, to information than any other individual. Despite the stated purpose of the act to provide "full and complete information regarding the affairs of government," she described a "culture of non-compliance" with both the letter and the spirit of the law. She stated that the "District government is basically a closed government," and the problem is "not merely an academic exercise." Rather, FOIA is a matter of holding government accountable to the people who pay the bills and providing information that is of interest to the citizens the government is supposed to serve.

Ms. Melamed described Kate Boo's numerous difficulties obtaining information related to the treatment of the District's retarded citizens, including a case manager who shredded the documents *The Post* requested. Unfortunately, Kate Boo's experience is not unique. Some of the persistent problems that journalists experience include government employees requiring written FOIA requests for even the most basic information like a telephone directory, requiring

information regarding the purpose of the request despite the irrelevance of this information under the law, lengthy delays beyond the 10 or 20 day time limits, and frivolous denials that do not fall within any of the exemptions outlined in FOIA.

Ms. Melamed expressed her support for Bill 13-829, and particularly those provisions related to electronic documents, partially released records, and monitoring of compliance with FOIA. Additionally, she proposed a few technical amendments, and urged the Council to review the Vital Records Act. Currently, vital records, such as birth, death and marriage certificates, are not accessible to the public in contrast to the less restrictive laws of many other states.

*The Post* submitted supplemental testimony that describes frequently requested documents that should be available on the District's website, FOI officer responsibilities, and comments regarding FOIA statistics submitted by the Mayor. Finally, Ms. Melamed supported the creation of a FOIA ombudsman and a mandatory training requirement for public officials responsible for FOIA compliance.

2.) **Wesley Pruden, Editor in Chief, The Washington Times**, agreed with Ms. Melamed that the District government has failed to meet the goals of the Freedom of Information Act. He stated that there is "widespread ignorance, misunderstanding or misapplication of the FOIA among city employees at all levels and across all agencies, including independent agencies such as the public schools and University of the District of Columbia." Mr. Pruden also confirmed that FOIA is used as an impediment to obtaining information, by requiring that requests for basic information be put in writing.

Mr. Pruden supported the amendments contained in the proposed legislation, and suggested some additional changes to improve the current law, including a training requirement, administrative remedies for non-compliance, modifications to annual reports, and designating a government official with responsibility for information held by private contractors.

3.) **Brian DeBose, Afro-American**, testified to two recent attempts to obtain information from District agencies, including DCRA and Department of Motor Vehicles (DMV). Mr. Goes, similar to other witnesses and journalists, encountered resistance on the part of government officials to comply with his requests. The request to DCRA involved a very recent controversy regarding a permit for a telecommunications tower on Wisconsin Avenue.

4.) **Kathryn Sinzinger, Editor and Publisher, The Common Denominator**, noted similar problems as her colleagues, and stated her belief that it is sometimes more difficult to get information as a reporter. She described one request for information to the MPD that took four months to receive a response. Ms. Sinzinger echoed a recurring complaint:

"While FOI laws are used in other parts of the United States as a citizen's 'last resort' when government refuses access to public information, the D.C. government often uses FOIA as an excuse to delay or otherwise impede the free flow of what should be readily available public

information."

Ms. Sinzinger encouraged the Council to undertake a comprehensive review of the DC-FOIA, as well as a review of the open meetings law.

5.) **Jim Donahue, Executive Director, Maryland, Delaware, D.C. Press Association**, testified to Maryland's recent audit of government compliance with the Public Information Act. Anecdotal evidence said that compliance was very poor, and this year, the audit confirmed it. In 50% of cases access was denied, and government employees frequently asked for identification, the purpose of the request, and where the requester worked -- none of which is relevant under the law.

In response to a question by Councilmember Patterson, the panel indicated that a "greatest hits list" of frequently requested information should include names, salaries, phone numbers, and term expiration dates for government employees and appointed Board members. Councilmember Patterson also inquired about methods to operationalize the definition of private contractors. Ms. Melamed stated that some states include all contractors, while others include only those contractors that receive a certain percentage of their funds from the government.

**Reform Legislation Panel:** The fourth panel included testimony from three witnesses regarding reform of open records legislation, and specifically the amendments proposed to the DC-FOIA in Bill 13-829. Generally, all three of the witnesses on this panel supported the proposed legislation, and each witness offered further suggestions for improvements.

1.) **Bob Becker, Society for Professional Journalists**, focused his testimony on the need for an autonomous office to provide training for FOI officers, act as an adviser to agencies on disclosure policy, and serve as an ombudsman to resolve disputes over disclosure. Five states have an office to serve this type of function, including New York, Connecticut, and most recently, Virginia. In response to a question asked by Councilmember Patterson, Mr. Becker indicated that it has cost Virginia approximately \$180,000 in the first year, and \$150,000 in the second year to establish such an office. Costs of course will vary depending on the structure of the office.

Mr. Becker supports the penalty provision in Bill 13-829, and notes that 22 other states impose similar sanctions that target individual employees in order to increase compliance with the law. He notes that a conflict may arise if the Office of Corporation Counsel is responsible for handling requests and enforcing the penalties, and therefore suggests FOI officers be appointed at each of the agencies and process requests internally. Additionally, Mr. Becker suggests that the annual reports include data regarding compliance with time limits, and the Council be required to submit a report to the Mayor on its disclosure activities.

2.) **Professor Jeffrey S. Gutman, Professor of Clinical Law and Assistant Dean for Academic Affairs, The George Washington University Law School**. Professor Gutman

describes three factors that explain why the DC-FOIA has fallen short of its promise of open access to information: "1. a culture of non-responsiveness, 2. the absence of resources, training and institutional commitment to adhere to the FOIA, and 3. a sheepish hesitancy to admit that records are either missing or in disarray." Similar to many of the other witnesses at the hearing, Professor Gutman's FOIA requests to District agencies, including Department of Human Services (DHS) and the Department of Employment Services (DOES), went unanswered until he filed a lawsuit.

Professor Gutman offered several recommendations to improve the DC-FOIA, including: 1. Quarterly publication of FOI officers in the *DC Register*, 2. Training requirements for newly appointed FOI officers, and the establishment of an independent office within the executive branch to provide training, oversight, act as an ombudsman, and handle administrative appeals, and 3. Establish public reading rooms and make certain categories of information available without the need for a request. Professor Gutman also suggested a series of technical amendments to Bill 13-829.

**3.) Rebecca Daugherty, Director, Freedom of Information Service Center, Reporters Committee for Freedom of the Press.** Ms. Daugherty testified that her experiences attempting to assist reporters obtain records under the DC-FOIA have met with reluctant government employees and little success. She supports Bill 13-829, particularly the provisions relating to extending coverage to private contractors, access to electronic documents, and sanctions for non-compliance.

Additionally, Ms. Daugherty notes that "U.S. Attorney General Janet Reno has made adherence to the federal FOI Act a part of the regular personnel evaluation for Department of Justice employees. As a result, they know that one of the laws they need to enforce is the FOI Act."

Ms. Daugherty submitted follow up testimony that provided a comprehensive review of 22 states that cover private contractors under their open records laws. She testified in response to a question by Councilmember Patterson, that she believes it is preferable for contractors to release information directly, rather than funnel information through the government.

#### **Executive Branch Panel:**

**Dr. Abdusalam Omer, Chief of Staff to the Mayor,** testified that "the Mayor is in full agreement with the intent of this Committee and the authors of the Freedom of Information Act. This administration recognizes that at the foundation of a strong democracy is an open government, and that citizen inquiries and press investigations play a crucial role in maintaining a strong democracy." Dr. Omer also noted the complexity of the issue, and the need to recognize competing interests such as privacy rights and fiscal restraints on government activity.

Dr. Omer described the actions that Mayor Williams has taken to improve the District's

responsiveness to FOIA requests, including mandating a FOI officer be appointed to each agency, and the resumption of the annual reporting process. Future reports will include information regarding compliance with the 10 day reporting requirements.

Dr. Omer expressed concern about the criminal penalties provision and the extension of the act to private contractors. He is concerned that Bill 13-829 may add to the perception that DC is not business-friendly. On the other hand, Dr. Omer agreed in response to a question by Councilmember Patterson, that any entity that receives public funds should comply with District laws.

Arabella Teal, Office of the Corporation Counsel, and Arnold Finlayson, Office of Documents and Administrative Issuances, also appeared and responded to questions asked by Councilmember Patterson.

#### **Public Witnesses:**

1.) **Jose de Arteaga, Labor Representative of the Doctors Council for the District of Columbia.** Mr. Arteaga suggested that all receivers, special masters, trustees or any other appointed supervisor or administrator of a government service or agency should be covered under Bill 13-829.

2.) **Nelson Rimensnyder** described his experiences seeking records from DPW and DMV, and testified in support of the creation of a FOIA ombudsman's office.

#### **Written Comments:**

**Verizon Washington, DC** submitted comments to express opposition to the inclusion of private entities in Bill 13-829.

### **COMMITTEE ACTION**

The Committee on Government Operations met on October 31, 2000, to consider and mark-up Bill 13-829. Present and voting were Councilmembers Patterson, Ambrose, Catania, and Schwartz.

Councilmember Patterson introduced the legislation, and explained that the purpose of the amendment is to augment and expand the existing Freedom of Information Act in the District. Specifically, Bill 13-829 will:

- Expand the law to cover electronic documents, and requires public bodies to make reasonable efforts to provide documents in the form or format requested. This change is consistent with the federal Electronic Freedom of Information Act Amendment of 1996 ("E-FOIA").
- Extend coverage of FOIA to WMATA and the Council of the District of Columbia. As

Chairman Cropp noted when the legislation was introduced, the Council practice has been to abide by the requirements of FOIA.

- Extend coverage of FOIA to private contractors performing government functions. The legislation as introduced raised a number of concerns regarding this provision, but the Committee responded to these concerns by drafting a more narrow provision to exclude private companies such as the phone company that merely provide some type of service to the District government. The new provision also clarifies that the government is responsible for providing records to the public, and therefore, for the costs associated with compliance with the law.

- Provide penalties for arbitrary and capricious violations of FOIA, including a \$100 fine and administrative penalties to be incorporated in the Personnel regulations.

- Require FOIA officers to receive a minimum of eight hours of training regarding implementation and compliance with FOIA.

- Clarify and expand documents that must be made available to the public, without the need to file a formal FOIA request. These documents must be available on the internet by November 1, 2001.

- Make minor changes in disclosure requirements and annual reporting requirements.

- Provide new requirements for maintenance and disposal of records filed with the Office of Campaign Finance.

Councilmembers Schwartz and Catania indicated that they had some concerns about the legislation as it was introduced. Councilmember Schwartz stated that her concerns related to the requirement regarding the format of information, and the costs associated with such a requirement. She described an example of a Council legislative session that is commonly recorded by audio and video tape, and a request for a copy of the hearing transcript instead of the tape that is available. Councilmember Schwartz expressed concern that these transcripts are costly to produce, but they are "readily reproducible," and therefore, required to be released under subsection (a-1) on page 2 of the Committee Print. Councilmember Schwartz proposed amending this section to add a requirement that the requester of information pay the costs of reproduction.

Councilmember Patterson accepted the amendment so that the new section (a-1) reads:

"(a-1) In making any record available to a person pursuant to this section, a public body shall provide the record in any form or format requested by the person, provided that the person shall pay the costs of reproducing the record in that form or format."

Additionally, Councilmember Patterson noted that the general counsel for the Office of Contracts and Procurement suggested a change in the provision that extends coverage of the act to private contractors. The draft Committee Print states that the public body with "oversight responsibility" for the contractor shall be responsible for making records available to the public, but the term has been changed to read "programmatic responsibility." This change was made in order to clarify that the Office of Contracts and Procurement is not responsible for handling all FOIA requests

for information with respect to private contractors.

Councilmember Catania objected to the inclusion of "any interstate compact agency" under the definition of a public body. He noted that the intent of this provision is to include WMATA under the District's FOIA law, but this is an inappropriate exercise of local legislative power. Councilmember Catania stated that the District can't write laws for federal, non-governmental entities, and therefore we should delete the phrase "any interstate compact agency" from the Committee Print. Councilmember Patterson agreed to delete this language while the Committee reviews the ability of the Council to legislate matters pertaining to WMATA. Councilmember Catania stated that he can move the Freedom of Information amendments at the Board level, and therefore, avoid the need to approach Maryland and Virginia state legislatures on the issue.

Chairperson Patterson moved for approval of the Committee Print of Bill 13-829, and the Committee voted 4-0 to approve it as amended, with members voting as follows:

YES:           **Councilmembers Patterson, Ambrose, Catania, and Schwartz**

NO:

PRESENT:

ABSENT:      **Councilmember Jarvis**

Chairperson Patterson then moved for approval of the Committee Report on Bill 13-829, with leave for staff to make technical corrections and changes to reflect the Committee discussion. The Committee voted 4-0 to approve the Committee Report, with members voting as follows:

YES:           **Councilmembers Patterson, Ambrose, Catania, and Schwartz**

NO:

PRESENT:

ABSENT:      **Councilmember Jarvis**

#### **ATTACHMENTS:**

- (A) Bill 13-829 as introduced by Councilmember Patterson, and co-sponsored by Councilmembers Ambrose, Brazil, Mendelson, and Schwartz.

- (B) Press Release for Public Hearing on the Freedom of Information Act and Bill 13-829, held October 12, 2000, and Results of Government Operations Committee Mini-Audit, October 5-6, 2000.
- (C) Mayor's Memorandum 2000-5, August 25, 2000, regarding Affirmative Information Dissemination Policy.
- (D) Mayor's Memorandum 2000-4, July 17, 2000, regarding Designation of D.C.-FOIA Officers by Each Agency and Department of the Executive Branch.
- (E) Chart, Statistics on FOIA Requests at District Agencies, as of October 12, 2000.
- (F) Councilmember Patterson's Opening Statement, FOIA Hearing, October 12, 2000.
- (G) Testimony provided by witnesses at FOIA Hearing, October 12, 2000.
- (H) Committee Print of Bill 13-829.

**ATTACHMENT A**

**COUNCIL OF THE DISTRICT OF COLUMBIA**  
441 4th Street, N.W.  
Washington, D.C. 20001

**Memorandum**

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To: Members of the Council

From: Phyllis Jones, Secretary to the Council

Date: September 20, 2000

Subject: Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Committee of the Whole Meeting on September 19, 2000. Copies are available in Room 714, the Legislative Services Division.

TITLE: "Freedom of Information Amendment Act of 2000", Bill 13-829

INTRODUCED BY: Councilmember Patterson  
CO-SPONSORED BY: Councilmembers Ambrose, Brazil, Mendelson and  
Schwartz

The Chairman is referring this legislation to the Committee on Government Operations.

cc: General Counsel  
Legislative Services Division

  
Councilmember Kathy Patterson

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Councilmember Kathy Patterson introduced the following bill which was referred to the  
Committee on \_\_\_\_\_.

To amend the District of Columbia Administrative Procedure Act, to provide for disclosure of  
electronic documents, and to extend coverage of the Act to private contractors performing  
government functions and the Council of the District of Columbia.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this  
act may be cited as the "Freedom of Information Amendment Act of 2000."

Sec. 2. Section 3 of the District of Columbia Administrative Procedure Act, approved October  
21, 1968 (82 Stat. 1204; D.C. Code § 1-1502), is amended as follows:

(1) Paragraph (18) is amended to read as follows:

"(18) The term "public record" includes all books, papers, maps, photographs,  
cards, tapes, recordings, or other documentary materials regardless of physical form or  
characteristics prepared, owned, used in the possession of, or retained by a public body. Public  
records include:"

"(A) Information stored in an electronic format; and

"(B) Records received or maintained by a private person, firm,  
corporation, or other private entity in the performance of a service or function for or on behalf of

a public body shall be subject to disclosure to the same extent that such records would be subject to disclosure if received or maintained by such public body."

(2) By adding a new paragraph (18A) to read as follows:

"(18A) The term "public body" means the Mayor, an agency, or the Council of the District of Columbia."

Sec. 3. Title 2 of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Code § 1-1521 *et seq.*), is amended as follows:

(a) Section 202 (D.C. Code §1-1522) is amended by adding new subsections (b-1), (b-2), and (b-3) to read as follows:

"(a-1) In making any record available to a person under this section, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

"(a-2) In responding under this section to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when the efforts would significantly interfere with the operation of the agency's automated information system.

"(a-3) For purposes of this section, the term "search" means to review manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(2) Section 204(b) (D.C. Code §1-1524(b)) is amended to read as follows:

"(b) In each case, the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (a) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made."

(c) Section 206 (D.C. Code §1-1526) is amended as follows:

(1) By designating the existing text as subsection (a);

(2) New paragraphs (9) and (10), and subsection (b) are added to read as follows:

"(9) Copies of all records, regardless of form or format, which have been released to any person under the Act and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

"(10) a general index of the records referred to under subparagraph (9), unless the materials are promptly published and copies offered for sale.

"(b) For records created on or after November 1, 2001, each agency shall make records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means."

(d) Section 207 (D.C. Code §1-1527) is amended by adding a new subsection (d) to read as follows:

"(d) Any person knowingly and willfully violating the provisions of this title by failing or refusing to provide access to records not subject to exemption from this title or by failing or refusing to provide access to such records within the time limits set forth in this title

shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed \$100.00. A prosecution under this section may only be commenced by the issuance of a citation, which shall be personally served upon the accused. The defendant shall not be arrested prior to the time of trial, except that a defendant who fails to appear for arraignment or trial may thereafter be arrested pursuant to a bench warrant and required to post a bond for his or her future appearance."

(e) Section 208 (D.C. Code §1-1528) is amended to read as follows:

"(a) On or before February 1 of each year, the Mayor shall compile and submit to the Council a report covering the public-record-disclosure activities of each agency and of the executive branch as a whole during the proceeding fiscal year. The report shall include:

"(1) The number of requests for records received by the agency and the number of requests which the agency processed;

"(2) The number of determinations made by each agency not to comply with requests for records made to the agency pursuant to this title and the reasons for each determination;

"(3) The number of requests for records pending before the agency as of September 30 of the preceding year, and the median number of days that the requests had been pending before the agency as of that date;

"(4) The number of appeals made pursuant to section 207(a), the result of the appeals, and the reason for the action upon each appeal that results in a denial of information;

"(5) A complete list of all statutes that the agency relies upon to authorize the agency to withhold information pursuant to section 204(a), a description of whether a court

has upheld the decision of the agency to withhold information pursuant to each statute, and a  
concise description of the scope of any information withheld;

"(6) The median number of days taken by the agency to process different  
types of requests;

"(7) The total amount of fees collected by the agency for processing  
requests; and

"(8) The number of hours that staff of the agency devoted to processing  
requests for records pursuant to this section, and the total amount expended by the agency for  
processing these requests.

"(b) The Mayor shall make these reports available to the public including by  
computer telecommunications or other electronic means.

"(c) The Corporation Counsel shall submit an annual report on or before February  
1 of each calendar year which shall include for the prior fiscal year a listing of the number of  
cases arising under this section, the exemption involved in each case, the disposition of such  
case, and the costs assessed pursuant to section 207(c)."

(6) Throughout the Act, omit the phrase "the Mayor or an agency," and replace it with  
the phrase "public body."

#### Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact  
statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved  
December 24, 1973 (87 Stat. 813; D.C. Code § 1-233(c)(3)).

Sec. 5. This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), approval by the Financial Responsibility and Management Assistance Authority as provided in section 203(a) of the District of Columbia Financial Responsibility and Management Assistance Act of 1995, approved April 17, 1995 (109 Stat. 116; D.C. Code § 47-392.3(a)), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Code § 1-233(c)(1)), and publication in the District of Columbia Register.

## **ATTACHMENT B**



COUNCIL OF THE DISTRICT OF COLUMBIA  
WASHINGTON, D.C. 20001

KATHY PATTERSON  
COUNCILMEMBER, WARD 3

CHAIRPERSON  
COMMITTEE ON GOVERNMENT OPERATIONS

OFFICE: (202) 724-8062

FAX: (202) 724-8118

**For Immediate Release**

**For more information:  
JoAnne Ginsberg 724-8062**

**Freedom of Information: *Not***

Washington D.C. -- October 12, 2000 -- A spot check on access to public documents at District government agencies by the Council Committee on Government Operations found some good but mostly bad news, Committee Chair Kathy Patterson announced today.

A two-day survey requesting documents required by law to be readily available to the public found that the Departments of Public Works and Fire and Emergency Medical Services provided access to specific public documents on request. Other agencies -- the Metropolitan Police Department, Department of Motor Vehicles, Board of Nursing Home Administrators and Alcoholic Beverage Control Board -- declined to provide documents requested. The committee undertook the survey to prepare for an oversight hearing today on the District's Freedom of Information Act (FOIA) which sets out a process by which the public can request and receive government documents.

"Our mini-audit asked agencies for records that should be available on request without going through the FOIA process," Patterson said. "And we documented what everyone assumes: in too many cases government workers do not know that the public has a right to public documents. The hearing, and legislation to strengthen our FOIA law, are efforts to remind all of us who work for the public that *our* business is *their* business. Public access to public records is a requisite for government to work." A summary of the documents requested and the agency response is attached.

The hearing begins at 10 a.m. October 12 in the Council chamber at 441 Fourth Street N.W. Testimony will include:

- ▶ Witnesses providing a historical perspective on the federal FOIA (Paul McMasters, the Freedom Forum; Benny Kass, former Congressional staffer);
- ▶ A panel of citizens and public advocates with experience seeking information from the District government;
- ▶ Representatives of news organizations including *The Washington Post* and *The Washington Times*;
- ▶ Experts describing reforms underway at the state and national level (Bob Becker, Society for Professional Journalists; Rebecca Daugherty, Reporters Committee for Freedom of the Press; Jeffrey S. Gutman, George Washington University Law School);
- ▶ Representatives of Mayor Anthony Williams.

In addition to reviewing compliance with the District's FOIA law, the Committee will hear testimony on Bill 13-829, the Freedom of Information Amendment Act of 2000. Introduced by Councilmembers Ambrose, Brazil, Mendelson and Schwartz in addition to Patterson, the legislation would expand the law to cover electronic records; extend FOIA coverage to contractors performing government functions; expressly include the Council in FOIA coverage; provide penalties for knowing and willful violations of the law, and amend current reporting requirements to clarify the information the Executive is to provide annually to the Council.

## **Results of Government Operations Committee Mini-Audit October 5-6, 2000**

### **Summary:**

A Committee on Government Operations staff member visited six District agencies and requested documents that should be available to the public upon request without filing a formal FOIA request. The agencies involved in the audit include the Department of Motor Vehicles, Board of Nursing Home Administrators, Metropolitan Police Department (Indiana Avenue and the 2nd District), Alcoholic Beverage Control Board, Fire and Emergency Medical Services Department, and Department of Public Works.

Only the Department of Public Works and Fire and Emergency Medical Services Departments provided access to documents while staff at other agencies declined for various reasons to provide access to or copies of the requested documents. In most instances District agency staff required the Committee researcher to show identification and explain the purpose of the request, and indicated that filing a formal FOIA would be required.

#### **1. Department of Motor Vehicles (DMV)**

**Documents requested: Abstract of driver's records.**

**Result: DMV referred researcher to the Office of the Corporation Counsel.**

D.C. Code § 40-405 states that: "The Mayor shall, upon request, furnish any person a certified abstract of the District of Columbia operating record of any person subject to this Act ...". DCMR Title 18 801.1 specifies that the operating record shall contain an enumeration of the motor vehicle accidents in which the person has been involved with, a record of convictions for violations of motor vehicle laws, rules or regulations, and a record of any vehicles registered in the name of the person. DCMR 18-801.1 further states that "A certified or uncertified abstract of the operating record of any person who has become subject to the Act shall be furnished to any person upon written request to the Director, accompanied by the fee specified in this section." D.C. Code § 40-405 sets the fee at \$5.

When requested to provide an abstract of an operator's record, DMV staff first asked for authorization from the individuals whose records were requested. When the researcher explained that such authorization was not necessary, and handed a copy of the pertinent section of the D.C. Code governing access to operator's records, DMV staff asked the researcher for identification. Researcher provided identification showing him to be a Council staffer. After DMV staff reviewed the request, they informed the researcher that the requested records were protected under the Federal Driver's Privacy Act. The

researcher stated that the federal act does not cover the information requested. The Federal Driver's Privacy Protection Act of 1994 prohibits release of certain personal information from state motor vehicle records. See 18 U.S.C.A. § 2721. "Personal information," as defined by the Act, does not include "information on vehicular accidents, driving violations, and driver's status." See 18 U.S.C.A. § 2725.

DMV staff nevertheless instructed the researcher to direct his request to the Office of the Corporation Counsel.

## **2. Board of Nursing Home Administrators ("Board")**

**Documents requested:** Copies of last three inspection reports for homes licensed by the Board.

**Result:** Board required written FOIA request be submitted to the general counsel for the Department of Health.

On making the request, the researcher was told that the staff person he needed to speak to was not in the office, and that he should return the following day. Upon his return the next day, the researcher was required to fill out a customer service/complaint form, which he was told is the standard procedure for any sort of request. After reviewing the form, the Board staff stated that he could not help process the request because he handles licensure, not inspections. Upon referral to a second staff member, the researcher was informed that the Board could not release the information requested. The second staff member suggested that the researcher submit a written FOIA request to the general counsel for the Department of Health. The Board also referred the researcher to the Medicare website to locate federal information, and provided a listing of D.C. nursing homes. The researcher did not identify himself as a Council staffer.

## **3. Metropolitan Police Department (MPD)**

**Documents requested:** Police Chief's expense report.

**Result:** MPD required written request for information.

The researcher was told upon request that an "expense report" does not exist, but that there is a petty cash fund and an appropriated budget for the office. When the researcher requested information pertaining to both the petty cash fund and the appropriated budget, MPD staff asked why he was interested in this information and for his professional affiliation. The researcher identified himself as a Council staffer. MPD staff then suggested that the councilmember submit a written request for information directly to Chief Ramsey. In response to questioning by the researcher, MPD staff responded that citizens not affiliated with the Council or District government requesting the same information would be directed to file a FOIA request in the Public Information Office for documents related to budget expenditures, but documents related to the petty cash fund might not be released to the public at all. The MPD staff member also noted that the petty

cash fund is under extensive oversight and strictly audited annually, but no documents were provided to the researcher.

#### **4. Metropolitan Police Department, 2nd District**

**Documents requested: Previous week's arrest book.**

**Result: MPD staff could not locate the arrest book.**

D.C. Code § 4-131 requires that the police force keep arrest books, and D.C. Code § 4-135 requires that this record be "open to public inspection when not in actual use." Arrest books are to contain the following information: (1) Case number, date of arrest, and time of recording arrest in arrest book; (2) Name, address, date of birth, color, birthplace, occupation, and marital status of the person arrested; (3) Offense with which the person arrested was charged and place where the person was arrested; (4) Name and address of the complainant; (5) Name of the arresting officer; and (6) Disposition of the case.

The researcher visited the Second District at 3 p.m. He was told that the day shift at MPD is responsible for filling out the arrest book, and that the day shift went off duty at 2 p.m. After searching for the arrest book and asking the researcher's interest in the documents, MPD staff stated that they could not locate the arrest book. They would ask the day shift to make the arrest book available to the evening shift in the future, but that the researcher would have to return another day to view the book. The researcher did not identify himself as a Council staffer.

#### **5. Alcoholic Beverage Control Board (ABC)**

**Documents requested: Copy of the application and license/permit granted for five most recent licenses.**

**Result: ABC Board required written request for information.**

The ABC Board is required to "keep a full record of all applications for licenses, and of all recommendations for and remonstrances against granting of licenses and of the action taken thereon" according to D.C. Code § 25-110. Asked to view the documents, the ABC staff referred the researcher's request to the Department of Consumer and Regulatory Affairs one-stop center. DCRA did not have the folders or records needed. DCRA staff referred the request back to the ABC Board and provided the researcher with a contact name. The ABC contact requested that the researcher submit a "request for copies" form specifying the information needed either by fax or email, and make an appointment prior to returning to view the documents. The researcher did not identify himself as a Council staffer.

#### **6. Fire and Emergency Medical Services Department (FEMS)**

**Documents requested:** Copy of most recent purchase order or sales contract for vehicle purchased by the Department.

**Result:** FEMS provided one copy of a purchase order.

The researcher was directed to the Department procurement office, where he was informed that the latest vehicle procurement was over a year ago. FEMS staff asked the purpose of the request, and asked for a business card. The researcher produced a card identifying him as a Council staffer. The researcher was then permitted to review the specific purchase order and given a copy of it, but was not given the accompanying folder to review. The FEMS staff member stated that the normal procedure for similar requests required a written FOIA request to the general counsel in order to obtain this information.

#### **7. Department of Public Works (DPW)**

**Documents Requested:** Copies of last three cut tickets (street cut permits) issued.

**Result:** DPW provided access to files.

The DPW staff helpfully provided files for June, August, and September, 2000, which contained several cut tickets. The DPW staff member was a new employee, and could not confirm whether the permits provided were the most recent permits issued by DPW. The researcher did not identify himself as a Council staffer.

**ATTACHMENT C**


GOVERNMENT OF THE DISTRICT OF COLUMBIA

KP  
10/1/00

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Memorandum 2000-5  
August 25, 2000

TO: Heads of Departments, Agencies, Boards, And Commissions  
All FOIA/PA Officers and Coordinators

ORIGINATOR: Anthony A. Williams, Mayor 

SUBJECT: Affirmative Information Dissemination Policy

00 SEP -5 P 4:44

COUNCIL MEMBERS  
RECEIVED

It has been and continues to be the policy of the District Government to increase and improve the access that our citizens have to this Government's information. That policy must include **greatly increased public access to information** requested under the Freedom of Information Act (FOIA), as well as practices that encourage and facilitate citizen access to information without the necessity of requesting information under FOIA.

The Freedom of Information Act provides for a statutory right of access to government information, including information about the operations and policies of government. This Act has been a tremendous resource for citizens who want timely, useful information and has benefited the work of researchers, writers, journalists, students of government, and historians. This access to information capability performs another useful set of functions: it informs citizen inquiries and it conserves scarce resources by broadening the availability of information.

The District Government must affirmatively augment its access to information capability. Therefore, budgetary and programmatic plans must be made for the development of information databases that contain the critical information required to respond to FOIA and other information requests, and to avoid, to the extent possible, any personnel, technology or resource limitations that traditionally impede access to information. In the era of e-commerce, Department heads must also now prepare to fully implement plans to provide on-line access to timely government information through the use of informative websites. Frequently asked questions (FAQs), press releases, agency contact information, agency program goals and plans, and other key operational information can be provided on-line. Plans must also include adequate training for employees dedicated to information dissemination functions, particularly as to the use of discretion in providing the fullest possible access to government information while providing protection where privacy concerns or legal constraints prohibit disclosure.

As we move forward, I expect all agencies, boards, and commissions to cooperate in furthering this Government's role in providing full access to information.

## **ATTACHMENT D**

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**ADMINISTRATIVE ISSUANCE SYSTEM**

Mayor's Memorandum 2000-4  
July 17, 2000

**TO:** All Department and Agency Heads  
**ORIGINATOR:** Beverly D. Rivers, <sup>JD</sup> Secretary of the District of Columbia  
**SUBJECT:** Designation of D.C.-FOIA Officers By Each Agency  
and Department of the Executive Branch

Pursuant to the provisions of the District of Columbia Freedom of Information Act of 1976, ("D.C.-FOIA"), D.C. Code §§ 1-1521 et seq. (1999 Repl.), and the District's implementing regulations contained at section 401 of the Title 1 of the District of Columbia Municipal Regulations, each agency and department head shall designate, in writing, an individual who shall serve as the D.C.-FOIA information officer for that agency or department.

Please complete and return the attached form to the Office of the Secretary of the District of Columbia by July 31, 2000. The form will be used to compile a listing of FOIA information officers which will be made available to all agencies and departments.

If you have any questions regarding this Mayor's Memorandum, please contact Arnold R. Finlayson directly at (202) 727-7882.

Your cooperation is appreciated.

Attachment:  
As stated.

73147-75

**ATTACHMENT E**

## Statistics on FOIA Requests at District Agencies

	Office on Aging	Board of Appeals and Review	Army Reserve National Guard	Commission on Arts and Humanities	Banking and Financial Institutions	Office of Boards and Commissions, EOM	Office of Cable Television & Telecommunications
<b>Name of Agency FOIA Officer</b>	Cynthia Simmons 727-8365	Francine Howard James 727-8280	Patricia Marshall 685-9717	Lionell Thomas 724-1475	Ava Boyd 727-1563	Ellen D. Laughlin 727-1372	Walter E. Adams, II 671-0066
<b>Total number of FOIA requests (4/1/99 to 3/31/00)</b>	0	2	1	3	0	1	0
<b>Decisions rendered</b>	0	2 granted, 0 granted in part, 0 denied	Administratively closed	3 granted, 0 granted in part, 0 denied	0	0 granted, 0 granted in part, 1 denied	0
<b>Name and title of disclosure officer who denied requests</b>	N/A	N/A	N/A	N/A	N/A	Marie Drissel	N/A
<b>Number of instances invoking FOIA exemptions</b>	0	0	0	0	0	1	0
<b>Number of instances each exception was invoked</b>	0	0	0	0	0	Request was denied because a District entity can't request information under FOIA from a District agency.	0
<b>Total amount of FOIA fees collected</b>	0	\$90.00	0	0	0	0	0
<b>Total amount of FOIA fees waived</b>	0	0	0	0	0	0	0
<b>Total number of personnel hours expended on FOIA requests</b> a) Supervisor hours b) Nonsupervisor hours	0	a) 0 b) 1 hour	0	a) 2 hours b) 0	0	0	0
<b>Approximate cost to Agency</b>	0	\$106.00	0	\$30.00	0	0	0

	Office of the Chief Technology Officer	Office of Contracting & Procurement	Office of the Corporation Counsel	Department of Corrections	Board of Elections and Ethics	Emergency Management Agency	Dept of Employment Services
Name of Agency FOIA Officer	Linda K. Argo 727-9247	Nancy Hapeman 727-0252	Richard Gondelman 724-5558, Pollie Goff 724-5562	James Paxton 724-6621	Terri Stroud 727-2194	Tanya L. Mitchell 673-2101 x1152	Michael Milwee 724-7120
Total number of FOIA requests (4/1/99 to 3/31/00)	0	145 (for last 5 years)	27	355	4	0	9
Decisions rendered	0	133 granted, 10 granted in part, 12 denied	10 granted, 1 granted in part, 6 denied, 10 forwarded or referred	332 granted, 7 granted in part, 15 denied	3 granted, 0 granted in part, 1 denied	0	6 granted, 3 granted in part, 0 denied
Name and title of disclosure officer who denied requests	N/A	Nancy Hapeman	Robert Rigsby	James Paxton -- 15 requests	Kenneth McGhie	N/A	Michael Milwee
Number of instances invoking FOIA exemptions	0	34	2	15	0	0	3 (all partial)
Number of instances each exception was invoked	0	1-1524(a)(1) invoked 31 times, 1-1524(a)(2) invoked 19 times, 1-1524(a)(4) invoked 9 times.	1-1524(a)(4) invoked twice.	1-1524(a)(2) invoked 9 times, 1-1524(a)(3)(D) invoked twice, 1-1524(a)(3)(E) invoked once, 1-1524(a)(3)(F) invoked once, 1-1524(a)(4) invoked twice.	0	0	1-1524(a)(2) invoked once, 1-1524(a)(3)(C) invoked once, 1-1524(a)(4) invoked once.
Total amount of FOIA fees collected	0	\$71.50 (\$2,313.56 was assessed)	0	\$1,023.20	\$27.20	0	\$68.50
Total amount of FOIA fees waived	0	No records	unknown	0	0	0	\$90 (search) est. \$400 (copying)
Total number of personnel hours expended on FOIA requests a) Supervisor hrs. b) Nonsupervisor hours	0	a) \$54 ph. b) \$24 ph.	unknown	a) 0 b) 160 hours	a) 0 b) 2 hours	0	a) 15 hours est. b) 25 hours est.
Approximate cost to Agency	0	\$78.00	unknown	\$2,550.00	0	0	\$1,425.00 (Supervisory time at \$35/hr. Nonsupervisory time at \$20/hr. plus copy costs.)

	D.C. Fire & EMS	Dept of Health	Dept of Housing and Community Development	Office of Human Rights	Dept of Human Services	Office of the Inspector General	Dept of Insurance and Securities Regulation
<b>Name of Agency FOIA Officer</b>	Tisa B. Smith 673-3320, Paul Jewell 673-3360	Thomas C. Collier 442-5973	Tia Matthews 442-7259	Tamika Maultsby 727-3900	Peggy Massey 279-6110	Victoria Lucchesi 727-9778	Rhonda K. Davis 442-7754
<b>Total number of FOIA requests (4/1/99 to 3/31/00)</b>	1,460	381	15 (11/99 - 3/00)	5	43	8	40
<b>Decisions rendered</b>	1,296 granted, 0 granted in part, 13 denied	379 granted, 1 granted in part, 1 denied	13 granted, 1 granted in part, 1 denied	3 granted, 1 granted in part, 1 denied	14 granted, 11 granted in part, 18 denied	3 granted, 3 granted in part, 1 denied	38 granted, 2 granted in part, 0 denied
<b>Name and title of disclosure officer who denied requests</b>	Theresa Cusick -- 4 requests Anthony Stuckey -- 9 requests	Thomas C. Collier -- 2 requests	Dena Reed -- 1 request	Tamika Maultsby -- 1 denial	Jewel E. Hernandez -- 14 requests, Gwendolyn G. Sutton -- 1 request	Charles Maddox -- 1 request	Rhonda K. Davis
<b>Number of instances invoking FOIA exemptions</b>	13	Dept did not have records.	2	2	7	4	
<b>Number of instances each exception was invoked</b>	1-1524(a)(1) invoked once, 1-1524(a)(2) invoked 12 times.	N/A	1-1524(a)(2) invoked twice.	1-1524(a)(3)(C) invoked twice.	1-1524(a)(2) invoked 5 times, 1-1524(a)(3)(D) invoked once, 1-1524(a)(6)(A) invoked once.	1-1524(a)(2) invoked twice, 1-1524(a)(3)(A) invoked once, 1-1524(a)(3)(C) invoked once, 1-1524(a)(3)(D) invoked twice, 1-1524(a)(3)(F) invoked twice, 1-1524(a)(4) invoked once.	1-1524(a)(6)(A) invoked once, 1-1524(a)(6)(B) invoked once.
<b>Total amount of FOIA fees collected</b>	\$9,180.00	\$3,821.50	0	\$40.00	\$564.40	0	\$776.95
<b>Total amount of FOIA fees waived</b>	\$3,970.00	\$150.00	0	0	\$306.50	0	0
<b>Total number of personnel hours expended on FOIA requests</b> a) Supervisor hours b) Nonsupervisor hours	a) 0 hours b) 1,850 hours	a) 50 hours b) 362 hours	a) 4 hours b) 30 hours	a) 3 hours b) 15 hours	a) unknown b) 215	a) Approx. 25 b) Approx. 150	
<b>Approximate cost to Agency</b>	\$105,000.00	\$8,568.00	\$1,075.00	\$100.00	unknown	\$6,500.00 (estimated)	

	Comm'n on Judicial Disabilities and Tenure	Mayor's Office on Latino Affairs	Comm'n on Mental Health Services	Metropolitan Police Department	Dept of Motor Vehicles	Office of the People's Counsel	Office of Personnel
<b>Name of Agency FOIA Officer</b>	Cathae J. Hudgins 727-1363	Tomas Bialet 671-2824	Phyllis Wells Blair 364-3422	Ofc. A. O'Leary Ms. B. Gooding 727-4383	Julian Nicholas 535-1585	Derryl Stewart King 727-3071	Jessica Pimentel 442-9644
<b>Total number of FOIA requests (4/1/99 to 3/31/00)</b>	0	0	5	234	380	0	17
<b>Decisions rendered</b>	0	0	5 granted, 1 granted in part (Request forwarded to DHS.)	124 granted, 18 granted in part, 24 denied, 64 resubmitted, 4 information did not exist	380 granted, 0 granted in part, 0 denied	0	14 granted, 3 granted in part, 0 denied
<b>Name and title of disclosure officer who denied requests</b>	N/A	N/A	N/A	Mr. David Lewis 727-4129	N/A	N/A	N/A
<b>Number of instances invoking FOIA exemptions</b>	0	0	0	57	0	0	4
<b>Number of instances each exception was invoked</b>	0	0	0	1-1524(a)(2) invoked 27 times, 1-1524(a)(3)(A) invoked 9 times, 1-1524(a)(3)(B) invoked 3 times, 1-1524(a)(3)(C) invoked 18 times	0	0	1-1524(a)(2) invoked 4 times
<b>Total amount of FOIA fees collected</b>	0	0	0	\$3,249.89	\$1,627.44	0	0
<b>Total amount of FOIA fees waived</b>	0	0		\$171.20	0	0	\$219.75
<b>Total number of personnel hours expended on FOIA requests a) Supervisor hours b) Nonsupervisor hours</b>	0	0	Time not recorded	a) 850 hours b) 1060 hours	a) 178 hours b) 0	0	a) 4.25 hours b) 34 hours
<b>Approximate cost to Agency</b>	0	0	unknown	\$41,000.00	0	0	\$1,117.15

	Office of Policy & Evaluation, EOM	Office of Property Management	Office of the Public Advocate, EOM	Public Library	District of Columbia Public Schools	Dept of Public Works	Office of the Secretary
Name of Agency FOIA Officer	Gregory McCarthy 727-6979	Reva Brown 724-4400	Eric K. Foster 442-8151	Rose Dawson 727-2982	Veleter M. B. Mazyck 442-5000	Emma Clark 671-2030	Arnold R. Finlayson 727-7882
Total number of FOIA requests (4/1/99 to 3/31/00)	0	1	0	0	300	13	11
Decisions rendered	0	0 granted, 1 granted in part, 0 denied	0	0	145 granted, 155 granted in part, 0 denied	13 granted, 0 granted in part, 0 denied	6 granted, 0 granted in part, 0 denied, 5 referred to other agencies
Name and title of disclosure officer who denied requests	N/A	N/A	N/A	N/A	Veleter M. B. Mazyck	N/A	N/A
Number of instances invoking FOIA exemptions	0	1	0	0	155	0	0
Number of instances each exception was invoked	0	0	0	0	1-1524(a)(3)(C) invoked 155 times.	0	0
Total amount of FOIA fees collected	0	0	0	0	0	\$185.50	0
Total amount of FOIA fees waived	0	0	0	0	\$1,000.00	\$28.25	0
Total number of personnel hours expended on FOIA requests a) Supervisor hours b) Nonsupervisor hours	0	a) 0 b) 8 hours	0	0	a) 100 b) 250 hours	Unknown	a) 8 hours b) 5 hours
Approximate cost to Agency	0	\$281.68	0	0	\$10,000.00	Unknown	\$494.50 (\$482.00 labor, \$12.50 copying)

	Sports & Entertainment Comm'n	Taxicab Comm'n	University of the District of Columbia	Washington Convention Center Authority	Office of Zoning
Name of Agency FOIA Officer	Scott Burrell 608-1125	George W. Crawford, 645-6018	Robin Alexander 274-5400	Claude Bailey 371-3036	Alberto Bastida 727-0330
Total number of FOIA requests (4/1/99 to 3/31/00)	1	1	10		4
Decisions rendered	1 granted, 0 granted in part, 0 denied	0 granted, 1 granted in part, 0 denied	8 granted, 1 granted in part, 1 denied		3 granted, 1 granted in part, 0 denied
Name and title of disclosure officer who denied requests	N/A	N/A	Robin Alexander, University Counsel		
Number of instances invoking FOIA exemptions	0	0	1		1
Number of instances each exception was invoked	0	0	1-1524(a)(2) invoked once.		1-1524(a)(4) invoked once.
Total amount of FOIA fees collected	0	\$20.25	\$161.30		0
Total amount of FOIA fees waived	0	0	\$32.80		0
Total number of personnel hours expended on FOIA requests a) Supervisor hours b) Nonsupervisor hours	a) 1 hour b) 0 hours	a) 3 hours b) 2 hours	a) 30 hours b) 15 hours		a) 14 hours b) 0
Approximate cost to Agency	0	\$220.00	\$1,926.00		\$500.00

**ATTACHMENT F**



COUNCIL OF THE DISTRICT OF COLUMBIA  
WASHINGTON, D.C. 20001

KATHY PATTERSON  
COUNCILMEMBER, WARD 3

CHAIRPERSON  
COMMITTEE ON GOVERNMENT OPERATIONS

OFFICE: (202) 724-8062  
FAX: (202) 724-8118

Councilmember Patterson's Opening Statement  
FOIA Hearing  
October 12, 2000

Good morning. I am Councilmember Kathy Patterson, chair of the Council Committee on Government Operations. This is an oversight and legislative hearing on the District of Columbia Freedom of Information Act. We are in the Council chambers at 441 Fourth Street, NW, at 10 a.m. on October 12, 2000.

The Freedom of Information law in the District of Columbia states: "the public policy of the District of Columbia is that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." Provisions of the District's Freedom of Information Act, quote, "shall be construed with the view toward expansion of public access and the minimization of costs and time delays to persons requesting information."

The Williams Administration is firmly on record in support of open access to government information. I am pleased to note that on August 25 Mayor Williams issued a Mayor's order stating: "it has been and continues to be the policy of the District Government to increase and improve the access that our citizens have to this Government's information. That policy must include greatly increased public access to information requested under the FOIA as well as practices that encourage and facilitate citizen access to information without the necessity of requesting information under FOIA."

In July Mayor Williams issued a memorandum requiring agencies to designate a FOIA officer, and the Council this year received annual reports from agencies for

the first time in recent memory. We have available a breakdown of the agency FOIA data and will be asking questions concerning that information later in the hearing. While there is some question as to the reliability of some of the data provided by the agencies, that there are current reports is a good sign of progress and good evidence of the administration's commitment on this issue.

The hearing today is both an oversight hearing to review current compliance with the letter and the spirit of the District's FOIA -- and a legislative hearing to take comments on proposed amendments to the law.

To prepare for this hearing in terms of compliance with existing law, the Committee staff undertook a spot check at District agencies to test responsiveness to requests for public documents. A Committee staff member visited six District agencies and requested documents that should be available to the public upon request without filing a formal FOIA request. The agencies involved in the audit include the Department of Motor Vehicles, Board of Nursing Home Administrators, Metropolitan Police Department (Indiana Avenue and the 2nd District), Alcoholic Beverage Control Board, Fire and Emergency Medical Services Department, and Department of Public Works.

Only DPW and Fire and EMS provided reasonably ready access to documents while staff at other agencies declined for various reasons to provide access to or copies of requested documents. In most instances, District agency staff required the Committee researcher to show identification and explain the purpose of the request, and indicated that filing a formal FOIA would be required to obtain the information.

Let me acknowledge that this miniaudit was neither comprehensive nor scientific but it did make clear that too often front line workers simply aren't aware that the public has a clear right to public documents. We may need wholesale change in attitude so that it is a first impulse of every District employee -- and not a last recourse -- to open offices and files and copy machines to those for whom we all work. We need to be in compliance with the spirit and not merely the letter of the Freedom of Information Act .

We will hear testimony on other experiences of persons seeking access to government documents. And we will have an opportunity to hear from representatives of Mayor Williams on this administration's plans to strengthen access to government records. It is important to make sure that the Mayor's strong commitment to open government is translated throughout the agencies so

that it is reflected in the attitude and the actions of each person on the front line who meets with the public, and I look forward to talking about training and performance standards to make that commitment a reality throughout the District government. I look forward to hearing about the efforts underway in the state of Maryland to improve open government.

The legislation before us today is Bill 13-829, the Freedom of Information Act Amendment Act of 2000, introduced September 19 and co sponsored by Councilmembers Ambrose, Brazil, Mendelson and Schwartz.

The legislation will expand the law to cover electronic records consistent with amendments to the federal law; extend FOIA coverage to contractors performing government functions; expressly include the Council in FOIA coverage; provide penalties for knowing and willful violations of the law, and amend current reporting requirements to clarify the information the Executive is to provide annually to the Council. The expansion to cover government contractors responds to a common complaint from human service program advocates and others, and is consistent with actions already taken in other states.

The federal "e-foia" amendments require agencies to post on their web sites and store in electronic reading rooms all records that have been requested under FOIA and are likely to continue to be requested. According to a survey by Public Citizen, for example, the federal government has already posted records of major public interest such as the FBI's files on Elvis Presley, Amelia Earhart, and Project Blue Book (a UFO study). I'm not certain at the moment what counterparts would be in the District government, but perhaps witnesses today can help us develop a list of most popular District records and we can recommend that they be posted on the District's own cutting edge web site.

In addition, I have an interest in addressing the fact that the District is now a "closed records" state in that vital records such as birth, death, and marriage certificates are not considered public documents as they are in other jurisdictions, and I would welcome comment from witnesses on whether that statute should be changed. With regard to the FOIA itself, I welcome comments on whether the current exemptions from disclosure merit review -- and whether there are any other steps we can take legislatively to improve public oversight of the public's business.

This is not simply an academic exercise to test whether we are in compliance with all provisions of a particular law. My own personal bias in this regard comes

from my own background as a newspaper journalist with a firm, fixed belief in open government -- not open government as an end in itself but open government that is, by being open, better government. I concur with the moving words of the third president, Thomas Jefferson, who wrote, "enlighten the people generally, and tyranny and oppressions of body and mind will vanish like evil spirits at the dawn of day."

(other opening statements)

I would now like to bring forward our first panel, invited to provide a historical overview of the freedom of information act, and the movement that preceeded it. I would also note that we have a wealth of background information on FOIA available on the table at the side of the room.

**ATTACHMENT G**

## **Access to Information: 10 Principles**

By Paul McMasters  
First Amendment Ombudsman  
The Freedom Forum

Open government is a work in progress; if the original authors of the federal Freedom of Information Act had the chance to do it over again, they most likely would have embedded the following principles in the legislation.

1. The law should emphasize a presumption of openness.
2. The law should define access broadly and positively.
3. Exemptions should be permissive, rather than mandatory. They should be kept to an absolute minimum. They should be narrowly defined. Barriers against exceptions in other laws must be erected.
4. The law should provide for administrative appeal and judicial review. Both *de novo* and *in camera* review should be specified to make sure that delay and denial are independently and completely reviewed.
5. The decision to provide records should be based on the nature of the records, not the identity or purpose of the requesters.
6. Agencies and employees should be directed to be aggressive and proactive in disseminating information and making access simple.
7. Electronic technology should be exploited to gather, manage and disseminate information; it should be requester-friendly.
8. There should be expeditious processing of requests for records. Multi-tracking and other systems for moving requests along should be encouraged.
9. There should be incentives for agencies and employees to provide records and make them more accessible; there should be fines or other penalties for agencies or employees who wrongfully delay or deny access.
10. Agencies should be required to report on disposition of records requests. The legislative branch should hold regular and careful oversight hearings on the law's implementation and execution.

Excerpt from testimony by Paul McMasters before the Committee on Government Operations, Council of the District of Columbia, on October 12, 2000.

BEFORE THE  
COUNCIL OF THE DISTRICT OF COLUMBIA

COMMITTEE ON GOVERNMENT OPERATIONS

Bill No. 13-829  
"Freedom of Information Amendment Act of 2000"

Testimony of  
Roderic L. Woodson, Esq.  
One Judiciary Square  
441 4<sup>th</sup> Street, N.W.  
Washington, DC 20001

October 12, 2000

Good morning, Councilmember Patterson and members of the Committee on Government Operations. My name is Roderic L. Woodson and I am a member of the public law department of Holland & Knight LLP, one of the largest law firms in the United States.

Throughout my professional career, I have focused my attention and energy on administrative law and practice, particularly administrative law and practice in the District of Columbia. Among my many DC Bar activities I am a former co-chair of the D.C. Affairs Section, a former member of the Continuing Legal Education Committee and Former Chairman of the Judicial Evaluation Committee. Additionally, I was a member of two DC Bar committees which designed the course on DC Practice which all new admittees to our Bar are required to take; and I regularly give instruction on the DC Administrative Law and Practice portion of the course.

I appear before you today to share some observations, experiences, and recommendations in connection with your consideration of Bill No. 13-829, the "Freedom of Information Amendment Act of 2000."

This Bill is of particular interest to me. Early in my career, I was the first federal Freedom of Information Officer for the U.S. Securities and Exchange Commission. The federal Freedom of Information Act, as we know it today, became what it is through a series of legislative measures adopted and approved in 1975.

During my tenure as Freedom of Information Officer, I had occasion to address issues related to the implementation and operation of this statute, including its exemption provisions. The most prominent of these are the exemptions dealing with confidential financial and commercial information and trade secrets; law enforcement investigations; government memoranda; personal privacy; and statutory mandates. As

many other commentators will undoubtedly observe today, the District's Freedom of Information Act is designed to provide a similar mechanism for disclosure of government documents and is codified as a portion of our Administrative procedure Act (D.C. Code § 1-150 *et seq.*).

It should be pointed out that the Freedom of Information Act does not apply to documents that are themselves a matter of public record. Rather, this statutory scheme is designed to capture documents, which are not found among public documents but, nevertheless, should be made available to the public unless the government can establish compelling reason otherwise. Those reasons are the foundation for the exemptions to the disclosure provisions of the FOIA.

It is worth noting that the FOIA as it currently exists represents a balancing of interests between the government's need to have information, the needs of our citizens and businesses to have privacy and confidentiality in their

activities and the need of the public to understand the operations of government.

The proposed amendments before the Committee today will have a profound impact on the operation and effect of the FOIA in our City. These proposals address five main areas: first, expanding the definition of government agencies subject to the FOIA to include the City Council; second, expanding the definition of government documents to include those received or maintained by private persons or entities which do business with the government; third, requiring that government "information" be manipulated to produce documents in any form or format requested; fourth, expanding the scope of documents required to be made public; and lastly, imposing criminal sanctions for failure to comply with FOIA response time requirements. I wish to focus my attention on three of these matters.

First, the proposal to expand the definition of government agencies to include private persons or private organizations and thus make them subject to receiving and responding to FOIA requests represents a huge sea change in the operation of this statute. Heretofore, only actual government agencies were subject to complying with requests for disclosure of documents. Under this proposed amendment, **any** individual or business doing business with the government will be required to receive and respond to such document requests. The government does business with thousands of individuals and entities, and the disruptive effect on the lives of these individuals and the operation of business will be dramatic.

Responding to an FOIA request involves several things. The documents must be found; the documents must be reviewed for application of an exemption; and the document must be prepared for disclosure. While this may seem a

relatively easy set of tasks, this preception is misplaced. Over the years since adoption of the current form of FOIA disclosure, government agencies have developed entire staffs whose jobs are devoted to such work. Such staff is needed. Interpretation and application of the exemptive provisions of the FOIA are not at all "bright-line" activities and have been the subject of continuous litigation. As well, the preparation of a document only partially subject to disclosure has developed into something of an art-form.

How are government contractors to handle these requirements? Government contractors employ people to do the job contracted for, not to handle FOIA disclosure requests. For example, the District contracts with many non-profits to handle social welfare issues, such as adolescent counseling, family preservation, social rehabilitation and the like. These entities consist of social workers, psychologists and therapists. Are you now going to make them review documents for FOIA

requests? How are these employees to be paid for this work? The government does not permit this kind of activity to be included in contract costs. Moreover, even if the government did permit such costs, it simply increases the overall cost to the government and taxpayers and takes away from performance by the contractor of the real work at hand.

Second, taking this example further, the proposed amendments would require these social workers, psychologists and therapists to produce documents in any way the requestor wants them if the underlying information is present within their non-profit. Notwithstanding the problem of distraction from the work they should be doing, **creation of new types of documents is not a part of FOIA law today.** This requirement in the proposal points up a fundamental issue: the purpose of the FOIA is the public disclosure of government documents, which *already exist*. The proposed amendments mistake this requirement as one for production of

"information." Recognition of this distinction, and the disruption caused by demands for access to underlying "information," is the reason that the FOIA was designed to focus on **records**. This aspect of the proposed amendments should be rejected.

Thirdly, is the criminal penalty for failure to respond in a timely manner. The question to be asked is who is subject to this penalty? The individual employee? The manager of the agency? The director of the department? The psychologist processing the FOIA request for his non-profit employer? The Mayor? The application of this penalty seems to pose serious issues of due process of law. FOIA requests are directed at organizations, not individuals. Attempting to criminalize the situation is over-reaching and heavy handed. The proper remedy is already being used – seeking a court injunctive order with financial penalties for failure to comply.

These comments are intended to point out some of the many problems created by the legislative proposals contained in the Bill and the need for further consideration before rushing to action. One more thing: how does this legislation reflect upon regulatory reform in the District? The extension of the FOIA to private business is not "business friendly" at all. To the contrary, it increases the cost of doing business significantly; imposes unreasonable administrative burdens; and calls for criminal sanction for otherwise minor infractions. Is any of this really necessary?

This concludes my remarks and I will be pleased to respond to any questions the Committee may wish to ask.

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October 12, 2000

## MEMORANDUM

TO: Committee on Government Relations

FROM: Brian Gilmore, Staff Attorney, WLCH

RE: Freedom of Information Act Amendments

On behalf of the Washington Legal Clinic for the Homeless, I would like to express my support for the Freedom of Information Amendment Act of 2000.

Increasingly, as more and more governmental functions get contracted out to private entities in the future, it will become even more important for the public to be able to obtain information regarding the use of taxpayer funds by contractors under the well established rules of the Freedom of Information Act. Although the contractors which now handle these important government functions are not government agencies, these entities, in fact, operate very similar to a government agency. This amendment, we believe, has the potential to vastly improve oversight and accountability with the public because of the increased likelihood that a public citizen or an organization can obtain information which the government should have been compiling in the normal course of business.

As for our own personal experience at the Washington Legal Clinic for the Homeless in advocating for homeless men, women, and families living in the city, we have found that information is difficult to obtain from the city's homeless contractor. In fact, our organization has rarely been successful in obtaining basic information in our advocacy efforts.

In fact, legally, it is our understanding, that the city's homeless services contractor is currently not subject to the local Freedom of



United Way

Please consider designating the Legal Clinic, #8472, in the CFC or United Way Campaign.



Information Act laws precisely because they are not a government agency.

This past summer, one of our attorneys made two formal written requests to the contractor for information on a particular issue of great importance to many of the homeless families who call our office everyday. There has yet to be a response to either request. Due to this lack of information, many homeless families who make inquiries at our office could not be afforded constructive advice with which to rely upon.

For the past two (2) years, I have personally been involved on an annual basis in budget advocacy in seeking adequate homeless services funding from the city. Oftentimes during that process I felt that if information were readily available to the public on homeless services programs, our advocacy efforts at the Mayor's office on funding and at the City Council would have been easier for the advocates, and the funding decisions by the City Council would have been effortless. This past budget cycle was especially difficult because information was again difficult to obtain and unreliable.

In preparing for this hearing, I made some preliminary inquiries to several organizations in the state of Georgia where as you know a similar law has been passed. Most non-profit organizations in that jurisdiction, I was informed, were in support of the law because it would encourage the government to be more aggressive and consistent in its oversight responsibilities and would reduce the chances for secrecy and cover-up by the private contractors and the government.

In closing, these amendments to the Administrative Procedures Act are in line with the direction of the country with respect to public accountability whether one agrees with the "contracting out" approach or not. Governments are contracting out many more functions and becoming smaller and, as they describe, more progressive. Technology also has advanced over the past few years and altered the information gathering process. These amendments are both necessary and prudent. I would gladly offer any other information to this committee on this issue as I am able to obtain it in my continuing research.

## **Testimony of Nicholas Keenan before the Committee on Government Operations, October 12, 2000**

Good morning Councilmember Patterson and members of the Committee. My name is Nicholas Keenan and I live in Shaw. I am here today as a private citizen to relate my experiences with the District of Columbia Freedom of Information Act. In the past year I have filed three requests under the Act, and I have not received a response of any kind to any of my requests. I will have specific recommendations for legislative actions to strengthen the existing law, which in my experience does not work.

My first experience with the law came in September of 1999. At that time, my neighbors and I were engaged in a dispute with the DC Public Schools over the use of the playground at Garrison Elementary School – we wanted it to be returned to use as a playground, and the DCPS wanted to rent it out as a parking lot. Eventually, Superintendent Ackerman decreed that the fate of the playground would be determined by the results of a survey of residents of the Garrison district. However, the contents of the survey, and the results of the survey, were and still are secret. In fact, the School Department wouldn't even tell me what the boundaries of the Garrison district are. I sent Superintendent Ackerman two requests under the DC Freedom of Information Act – one requesting a copy of the survey and its results, and another requesting the boundaries of the Garrison School. Copies are attached. I have not received any response to either request.

My next experience came in January of 2000. On my block there are a number of nuisance properties. For several years I have been trying without success to get the Department of Consumer and Regulatory Affairs to take enforcement actions against the owners of these buildings, but with no visible success. One of the things that has been frustrating to me is that when I speak with officials from DCRA, I often get contradictory and evasive answers to my questions about the status of properties on my block and the details of the enforcement process. In January I sent a Freedom of Information Act request to Lloyd Jordan, the Director of DCRA at the time. In it, I asked for details of all enforcement actions that had been taken on my block in the past year, and for any documents explaining the enforcement process. I have not received any response to my request.

In February of 2000, I filed a lawsuit in DC Superior Court to force compliance with my request. I am not a lawyer, and it was a time-consuming and somewhat expensive process. The cost of filing a complaint is \$120.00, all of the documents need to be notarized, and the plaintiff needs to serve the defendant personally. The City never responded in any form to my lawsuit. I had to abandon my lawsuit when my wife gave birth to twins in May.

From an oversight perspective, I see two issues for you. Issue One: Neither the spirit nor the the letter of the law is being followed. Essential information about

the workings of government, that the public paid for, is not available to the public. Only those people with the resources to pursue legal remedies are able to get access to purportedly public information. Issue two: What is the cost to the taxpayers of this policy? When I file a lawsuit to force the release of information, the city incurs the cost of defending that lawsuit. When I prevail, the city is liable for my costs. All of these costs are incurred as a result of the city government refusing to comply with its responsibility under the law. Plus, the law is written so that if a request goes to litigation, the city has less leeway in fulfilling the request and thus is exposed to greater costs than if the request had just been honored originally.

I would also like to point out that secrecy is often a shield for incompetence. I can't help but think that maybe the reason that none of my requests were honored is because no one knew the answers.

What are my recommendations? I urge the Council to strengthen the law to make it easier for citizens to use the courts to force compliance with the law. I ask the Council to examine the laws of Florida, which has a special court that handles only FOIA matters. In Florida, if a request is not honored within ten days, a hearing is held on the eleventh day, and a ruling is issued. I also urge the council to eliminate the filing fees and relax the procedural hurdles for FOIA cases, so that the process is open to all citizens.

As you hear testimony today, don't let anyone tell you that they don't have the budget or resources to comply with FOIA requests. That line of thinking views Freedom of Information as a luxury, rather than a fundamental principle of government. Anyone who would say that doesn't really believe in Freedom of Information anyway. Saying that makes no more sense than saying that we don't have the budget for free elections, adequate record-keeping, public meetings or any of the other components of democratic government. If you truly believe that government should work for the people, and not vice versa, then FOIA is not an option -- it's part of the process.

*Nicholas B. Keenan  
633 Q Street NW  
Washington, DC 20001*

January 26, 2000

Mr Lloyd Jordan  
Director  
Department of Consumer and Regulatory Affairs  
941 North Capitol Street, NE  
Washington, D.C. 20002

VIA Federal Express

RE: FOIA Request -- Nuisance Properties Enforcement Actions

Dear Mr. Jordan:

Pursuant to The DC Freedom of Information Act, DC Code § 1-1521 et seq., I am requesting that I be permitted access to and be provided copies of documents, memos, papers, publications, reports, writings, notes of meetings or telephone conversations, meeting agendas, research, and any and all information and records in the possession of or otherwise under the control of the District of Columbia Department of Consumer and Regulatory Affairs or any of its subagencies, to include magnetic, laser and film records, pertaining to the following:

- (1) Enforcement procedures and policies of the Department of Consumer and Regulatory Affairs regarding nuisance properties.
- (2) Any and all enforcement actions against properties at the following addresses that (a) were taken in calendar year 1999, or (b) are currently pending:
  - 600 Q Street Northwest
  - 604 Q Street Northwest
  - 642 Q Street Northwest
  - 643 Q Street Northwest
  - 1509 Marion Street Northwest
  - 1516 Marion Street Northwest
  - 1533 Marion Street Northwest
  - 1504 6th Street Northwest
  - 1510 6th Street Northwest
  - 1618 6th Street Northwest
  - 1634 6th Street Northwest
  - 1547 7th Street Northwest

Please provide me with copies of the above or an explanation why they are not available. I request that any of the information withheld be identified and the reasons for withholding it be stated, along with the name(s) of the person(s) and department ordering such withholding.

If you have questions about this request I can be reached during the day at (202) 347-2076.

Your response within the ten-day statutory period is specifically requested.

Sincerely,

Nicholas B. Keenan

cc: Charly Carter, Office of the Public Advocate

***Nicholas B. Keenan  
633 Q Street NW  
Washington, DC 20001***

September 21, 1999

Van Yearwood  
Office of the General Counsel, District of Columbia Public Schools  
825 North Capitol Street NE  
Washington, DC  
20002

RE: FOIA Request -- District Boundaries for Garrison Elementary School

Dear Mr. Yearwood,

Pursuant to The DC Freedom of Information Act, DC Code § 1-1521 et seq., I am requesting that I be permitted access to and be provided copies of documents :

- (1) Defining the current boundaries of the school district for Garrison Elementary School.
- (2) Listing the addresses of households whose residents are eligible to attend Garrison Elementary School.

Please provide me with copies of the above or an explanation why they are not available. I request that any of the information withheld be identified and the reasons for withholding it be stated, along with the name(s) of the person(s) and department ordering such withholding.

If you have questions about this request I can be reached during the day at (202) 347-2076.

Your response within the ten-day statutory period is specifically requested.

Sincerely,

Nicholas B. Keenan

**Nicholas B. Keenan**  
**633 Q Street NW**  
**Washington, DC 20001**

September 22, 1999

Van Yearwood  
Office of the General Counsel, District of Columbia Public Schools  
825 North Capitol Street NE  
Washington, DC  
20002

VIA REGISTERED MAIL

RE: FOIA Request -- Survey of Parents, Students and Faculty of Garrison Elementary School

Dear Mr. Yearwood,

It has come to my attention that the District of Columbia Public Schools is planning to conduct a survey of the parents, students and faculty of Garrison Elementary School to measure sentiments for the use of the playground at that school.

Pursuant to The DC Freedom of Information Act, DC Code § 1-1521 et seq., I am requesting that I be permitted access to and be provided copies of documents, memos, papers, publications, reports, writings, notes of meetings or telephone conversations, meeting agendas, research, and any and all information and records in the possession of or otherwise under the control of the District of Columbia Public Schools or any of its subagencies, to include magnetic, laser and film records, pertaining to the following:

- (1) All information and communications pertaining to the above-mentioned survey.
- (2) All results of the above-mentioned survey.
- (3) A copy of your Subject Matter list that categorizes all of the records pertinent to my request, whether or not the records or any portion thereof are available.

Please provide me with copies of the above or an explanation why they are not available. I request that any of the information withheld be identified and the reasons for withholding it be stated, along with the name(s) of the person(s) and department ordering such withholding.

If you have questions about this request I can be reached during the day at (202) 347-2076.

Your response within the ten-day statutory period is specifically requested.

Sincerely,

Nicholas B. Keenan

September 24, 2000

Mr. James Menfah  
Department of Human Rights and Local Business Development  
441 4<sup>th</sup> St., NW, Suite 970N  
Washington, DC 20001

Dear Mr. Menfah:

As we discussed during our Sept. 18 phone conversation, I am asking your office to provide me with an electronic database of the District of Columbia's small and disadvantaged businesses list. I am asking for all public information associated with these listings, including but not limited to, business names, locations, principal officers, and business activities with the district.

During our conversation, you said the kind of information I am looking for is in the "Local Small Disadvantaged Business Enterprises Directory of Certified Forms" database. However, after reading the office's website, I also found a reference to the "Office of Contracting and Procurement vendor file database and the LBOC directory." I am not sure how the databases are related, but am requesting the electronic databases and all the public information associated with them.

In addition to the databases, I am requesting any public information generated from the databases including, but not limited to, statistical information, annual or official reports and a field layout, which defines the terms and values used in the database.

I am a journalism student at the University of Maryland and intend on reviewing the data for possible use in a published article.

The following request is made pursuant to District of Columbia Freedom of Information Act of 1974, D.C. Code Ann. § 1-1521-29. Under section § 1-1522(c) of this law, you have 10 working days to produce the requested material.

Mr. Menfah, I understand that the new database is under construction and the old Microsoft Access database has restricted fields. However, like I said on the phone, I am more than willing to work in whatever way I can to get copies of these databases within the time allowed by law.

I had hoped to take care of this request with minimal paperwork. But you made it clear that you did not intend to provide me with copies of the electronic databases or field layouts. You also said you could not provide me with a printed copy of the list within the 10 days allotted by law. Therefore, I felt it necessary to file a formal, written request for the information.

I will do whatever is necessary to minimize the work this request generates. I would like to work with you so I can get exactly what I need and your office can comply with the law.

Feel free to contact me via phone or email at 301-226-2332 or [frates@wam.umd.edu](mailto:frates@wam.umd.edu).  
Thank you in advance for your time.

Sincerely,

Chris Frates  
8000 Boteler Lane Apt. 433  
College Park, MD 20740

**Council of the District of Columbia  
Committee on Government Operations  
October 12, 2000  
Bill 13-829 – Freedom of Information Amendment Act of 2000**

**Testimony of Carol Melamed, Vice President for Government Affairs  
The Washington Post**

My name is Carol Melamed. I am The Washington Post's Vice President for Government Affairs. I would like to thank Chairman Patterson and the members of the Committee on Government Operations for giving The Washington Post this opportunity to comment on Bill 13-829, the Freedom of Information Amendment Act of 2000, and on our newsroom's experience in seeking records under the current D.C. Freedom of Information Act.

The policy behind the Freedom of Information Act is simple and straightforward. As the law states right from the start: "Generally the public policy of the District of Columbia is that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. To that end, provisions of this subchapter shall be construed with the view toward expansion of public access and minimization of costs and time delays to persons requesting information."

One basic point is worth stressing: the law says "all persons." Its purpose is to afford access to all members of the public, including the press. The press has no special rights; rather, we have the same right to "full and complete information" as any individual. Thus, as any individual does, we expect the District government to comply with the letter and the spirit of the law.

Unfortunately, over the years we have seen repeated non-compliance with both the letter and spirit. In the words of one of our senior editors "we have to file [written FOIA requests] for the most basic of information. They don't deal with the requests and then when prodded, they also end up denying our requests. The DC government is basically a closed government."

As the Committee considers this vital public issue, I thought it would be helpful to first review with you the typical problems that our newsroom faces on a day to day basis when it seeks public records, and then to comment on the proposed legislation.

First, compliance with the existing law. Why is it so important to journalists? This is not an academic exercise. It is a matter of government accountability to the people the government serves, to the people who pay for the government with their tax dollars.

There are important matters of public interest that we have been able to bring to light as a result of obtaining public records. These stories have dealt with a range of subjects, from life and death matters, like shootings by the police, to government corruption and mismanagement.

A powerful example is reporter Kate Boo's Pulitzer Prize- winning series on the mistreatment of the District's retarded citizens. The series uncovered systematic failures by the District government to protect some of its most vulnerable citizens, and has prompted sweeping reviews and reform of the District's program for the retarded. Much valuable evidence came from the files of the agencies responsible for the care of the retarded. But in order to obtain

these records, Kate time and again had to overcome failures by the District government to comply with her FOIA requests. For example:

- The series reported that internal DC Family Services reports showed that the body of Fred Brandenburg – a retarded citizen who died after being drugged by the staff at his group home – had been washed before the medical examiner arrived to take the body for an autopsy. But Kate, with the assistance of our lawyer Eric Lieberman, had to fight for approximately six months to get the Department of Health to turn the reports over. She first requested records relating to deaths in the group homes from the Department of Health in the Spring of 1999. By September 1999, Kate had received some records, but not any relating to Fred Brandenburg's death. So she specifically asked the agency in September for records relating to his death. Subsequently, Kate learned that the agency in fact had records showing that Brandenburg's body had been washed before the Medical Examiner came for the body. By October 1999, Kate still had received no response to her September letter. So she wrote again in October, asking for these same specific records. Finally – approximately six months after they had first been requested – the record containing the evidence that Fred Brandenburg's body had been washed was produced.
- Kate experienced many other FOIA compliance problems as well. In the Fall of 1998, she was repeatedly thwarted when she sought routine

public records relating to oversight of the District's group homes for the retarded – monitoring reports, complaints, complaint investigations, and audit reports. The agency responded that it did not understand what she meant in her requests – though Kate identified the documents according to the precise names that had been provided to her by sources inside the agency. Eric got involved and requested a meeting with DHS officials. In the meeting, the General Counsel professed not to understand what Kate was requesting. He finally backed off this ludicrous position, after we threatened to sue and not until Kate specifically told him that these records existed and that they were maintained on the second floor of the Bundy Building on O Street, N.W. After six months of extensions, denials, negotiations, and threats, the agency finally produced the records in January and February of 1999.

- When Kate sought death records from DHS in the Spring of 1999, she was first given records relating to 11 deaths in six years, with most of the information redacted. But earlier DHS had told The Post that 53 retarded people died between October 1995 and January 1999. For months, Kate pressured the agency to release additional records or explain the discrepancy. She eventually forced the agency to acknowledge that more than 110 retarded people had died. Eight months later, the agency turned over 114 death certificates in heavily redacted form.

- Finally, when Kate tried to discover why an autopsy of Fred Brandenburg was never performed, DHS first misinformed her that his sisters were Jehovah's witnesses and had refused to authorize an autopsy, and then told her that Fred Brandenburg's case manager had shredded the documents relating to his case after The Post began making inquiries.

Kate Boo's odyssey is not unique. On a daily basis, reporters in our newsroom are faced with a culture of FOIA non-compliance. The same sorts of compliance problems surface on a routine basis. Here are some of the more persistent problems The Post has experienced:

- Requiring written FOIA requests. The D.C. Freedom of Information does not require that requests for records be put in writing. But for even the most simple requests, D.C. public officials have forced our reporters to file written FOIA requests. For example, this September, D.C. Public Schools refused a Post reporter's request for a copy of their telephone directory. He had no choice but to file a written FOIA request, and the telephone directory was not produced until nine days after the request was received by the agency. This is the same agency that also required a reporter to file a written FOIA to obtain a copy of the resume submitted with the employment application of a current senior executive in D.C. Public Schools.
- Requiring information concerning the purpose of the request. Under the D.C. Freedom of Information Act, the purpose of the request and

the identity of the requester are not relevant. Documents are either public records and must be produced to anyone, or are exempt in whole or in part and the exempt information should not be released to anyone. But District officials have demanded to know the purpose behind the request for releasing public records. For example, when Kate Boo requested police investigation records into the death of James Scott, a 55 year old mentally retarded person who had been fatally injured at a day treatment program, the police initially denied the request on the ground that she provided "no specific reason(s) as to why the information is desired or for what purpose the information should be used." Likewise, when the Metro Desk requested detailed information on the performance of students on Stanford 9 tests (without identifying the students), District officials demanded to know why The Post wanted the information.

- Delay. The law requires that within 10 working days after receiving a request, the records must either be produced or the requester must be notified that the request is being denied. In specified unusual circumstances, the District government can seek one 10-day extension. But extensions are the norm and not the exception, and compliance can often take months. Kate Boo's experience is a case in point, but there are many other examples: (1) On May 24, 2000, a Post reporter filed a FOIA request with the Metropolitan Police Department asking for information on how many government vehicles

had been photographed by the District's new red light enforcement cameras, how many had actually been issued tickets, and how many had been issued warnings or notices. That FOIA request has yet to be answered. (2) The MPD has declined even to provide a written report on the status of the request to The Post. (3) A request to the MPD for several police roll call sheets went unanswered for months. In July, 2000, a Post reporter requested copies of weekly reports prepared by the security personnel at D.C.'s public schools describing incidents that they responded to in the previous week. Those records were produced only two weeks ago, after Superintendent Vance personally intervened to shake the records loose.

- Frivolous denials. Post reporters routinely receive denials that strain credulity. A May 2000 request for a copy of the current police roster was denied. Kate Boo's request for inspection reports on the group homes was denied because the agency claimed she had not adequately described what she was requesting. A Post reporter had a request for records of corporal punishment incidents in D.C. Public Schools denied on the ground that production of the records would interfere with ongoing criminal investigations, only to find out later from law enforcement agencies that the investigations were closed.

In short, the process doesn't work. The law commands that its provisions "shall be construed with the view toward expansion of public access and minimization of costs and time delays to persons requesting information," but

that command apparently goes unnoticed. Getting compliance with a FOIA request is the exception, not the rule.

Our reporters view FOIA as a last resort for getting information from the District government. The process moves too slowly. It requires far too much effort to obtain even basic public records. On a regular basis, reporters have to seek the assistance of The Post's lawyers to get agencies to abide by the law – a luxury that the ordinary public citizen would likely not have at his or her disposal.

The only enforcement mechanism provided by the statute – bringing a lawsuit – is meaningless as a practical matter. Every reporter and editor in our newsroom knows that litigation is the remedy you pursue after you have lost the battle, because litigation means that you won't get the records for months, or even years – long after the records are needed for reporting a story.

In sum, we have described a widespread culture of non-compliance that has developed over the last 25 years, due in part to lack of training of government employees. This culture can – and must—be changed. Thus, we are grateful to Council member Patterson for holding this hearing and for her other efforts in this area. We also commend Mayor Williams for his commitment to open government. Since he has taken office, the newsroom has had much success freeing public records when the Mayor or some members of his staff have been called upon for help. But one should not have to seek the assistance of the Mayor or his staff in order to get District officials to do what the law requires.

We believe that the key to compliance is training of government officials – from department heads to front-line clerks. Other states, including Maryland and Virginia, are undertaking such efforts. We, through our press association, are glad to help in any way we can.

Now let me turn to the proposed legislation. I understand that another panel will address the bill in detail, so I will merely point out that it contains a number of important provisions, which we support, including:

- “E-FOIA” provisions concerning public access to records in electronic format.
- a provision that requires specific explanation of deletions from redacted records.
- provisions for monitoring the government’s FOIA compliance.

We also have a few technical comments. First, with respect to the proposed amendment to Section 204(b) (D.C. Code 1-1524(b)), we suggest that the Council make clear that this language supplements, but does not replace, the current statutory language. Further, we suggest that the last sentence of the proposed language be amended to read as follows: “if technically feasible, the extent of the deletion and the specific exemption(s) shall be indicated at the place in the record where the deletion was made.” (Proposed new language is underscored). The purpose of this clarification is to prevent confusion over which exemption applies to a particular deletion when the public body claims more than one exemption as a basis for withholding information.

Second, with respect to the proposed amendment to Section 206 (D.C. Code § 1-1526), it is not clear to which records the new subsection (b) applies. Does that section – which requires public bodies to make records available by computer telecommunications or other electronic means by November 1, 2001 – apply to all records referred to in proposed new subsection (a) or just to those in subsection (a)(9)?

Finally, we recommend that the Council review the current law governing accessibility to vital records in the District – such as birth certificates and death certificates. The law is very restrictive, unlike the laws in many other states.

Thank you very much. I am glad to answer any questions that you might have.

**Council of the District of Columbia  
Committee on Government Operations  
October 12, 2000  
Bill 13-829 – Freedom of Information Amendment Act of 2000**

**Supplemental Testimony of Carol Melamed  
Vice President for Government Affairs, The Washington Post**

Several issues were raised during the Committee hearing that The Post would like to address in supplemental testimony:

1.     Posting frequently requested records on the District's official website. Council member Patterson expressed interest in having the District government post information on its website that is likely to be the subject of repeated inquiries. The Post supports this idea and believes that there are several types of records of substantial public interest that should be posted routinely on the District's official website. These include, but are not limited to:

- Felony crime incident reports;
- Government contract information (in searchable format for all contracts for more than \$25,000, as the federal government now does);
- School-level data for test results on standardized testing, such as the Stanford-9 test;
- Precinct-level election results;
- Construction project approvals, and associated street closings; and
- Zoning variances.

2.     FOI Officer Responsibilities. Council member Patterson raised a related suggestion that the Freedom of Information Act officer for each District agency should identify records within his or her agency that should automatically be disclosed, without a written FOIA request. The Post supports this idea, as it remedies a frequent problem our newsroom has experienced. For example, in August 1999, D.C. Public Schools provided The Washington Times with information regarding sexual misconduct at D.C. Public Schools. When The

Post requested copies of the same information that was given to The Times, D.C. Public Schools insisted that The Post submit a formal written FOIA request.

3. Comments on FOIA Statistics Submitted By the Mayor

Pursuant to D.C. Code § 1-1528. The Post commends the Mayor for fulfilling the statutory requirement to file an annual report with the Council on "the public-record-disclosure activities" of each District agency, pursuant to D.C. Code § 1-1528. Based on a survey of FOIA requests for the period March 31, 1999 to April 1, 2000, the Mayor's Office concluded that FOIA requests were granted in full 87% of the time, in part 6% of the time, and denied 7% of the time.

These percentages are contrary to our experience. But in any event, while it may be true that District agencies technically granted FOIA requests 87% of the time during the survey period, that figure does not mean that the District government has achieved widespread compliance with the law. First, the Mayor's survey did not measure whether requests that were "granted" were done so within the statutory deadlines. To the extent that agencies fulfilled requests after the statutory deadlines expired, the Council should not conclude that these agencies complied with the letter and spirit of the law. Second, these raw numbers do not assess the quality of compliance. An agency may state that ultimately it granted a request. But only by examining the actual history of the request can the Council evaluate whether that "grant" was in accordance with the way the system is supposed to work.

For example, the District of Columbia Public Schools reported that it granted in whole or in part all 300 FOIA requests filed during the survey period. But here is what happened with one Post request.

On August 26, 1999, The Post filed a FOIA request with D.C. Public Schools seeking District-level and individual school-level performance results in electronic form for each component of the Stanford-9 Achievement tests by grade, by grade and sex, by grade and race, by grade and special education status, and by grade and SES/free- and reduced-lunch participation rates. The Post further explained that student-level data stripped of student identifiers was preferable because it would enable The Post to analyze student progress over time. The Post stipulated that we would not publish such data before aggregating it to the school level. The Post had requested and received similar data from the Maryland and Virginia departments of education in each of the last two years.

Three months later, The Post still had not received any of the requested electronic data from the District, though similar data was again being produced by surrounding school districts including Prince George's, Montgomery, and Fairfax counties.

In December, Post reporters met with D.C. Public School officials to discuss the data that still had not been received. District officials suggested that The Post submit a research proposal in order to facilitate release of the data. The Post did so, to no avail. In January, District officials informed The Post that they would not release any data broken down by race. No other school districts

in the surrounding areas insisted on withholding race-based data. Given that so much time had already elapsed, The Post agreed not to seek race-based data and the rest of the data was ultimately produced on February 1, 2000 (along with a promise from D.C. Public Schools that The Post would not encounter the same problems getting the same kind of standardized test data in the future).

4. Creation of a FOIA Ombudsman. Several witnesses proposed the establishment of an ombudsman to answer questions about the Freedom of Information Act from both government employees and the general public. Such an officer could provide informal advice and/or formal written, non-binding advisory opinions. The Post supports such proposals, which would increase the likelihood of timely release of records and decrease reliance upon prolonged and expensive enforcement litigation.

5. D.C. FOIA Exemption 4. D.C. Code § 1-1524(a)(4) creates a discretionary exemption from disclosure for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Council member Patterson asked for clarification as to the meaning of this exemption.

The exemption tracks the language of Exemption 5 of the federal Freedom of Information Act. While there is little reported case law in the District interpreting D.C. FOIA Exemption 4, case law interpreting the federal FOIA is "instructive authority" with respect to the D.C. FOIA. See Washington Post Co. v. Minority Business Opportunity Comm'n, 560 A.2d 517, 521 n. 5 (1989). In general, federal courts have construed this exemption as encompassing

documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges that have been held to be incorporated within federal Exemption 5 are the deliberative process privilege (sometimes referred to as "executive privilege"), the attorney-client privilege, and the attorney work product privilege. For the Committee's convenience, we have enclosed the detailed discussion of the scope of federal Exemption 5 contained in the U.S. Department of Justice's Freedom of Information Act Guide & Privacy Act Overview (Sept. 1998 Ed.). We are happy to address additional specific questions the Committee may have regarding this exemption.

6. FOIA Coverage of Independent and Interstate Compact Agencies. The Committee received testimony during the hearing that any amendment to the D.C. Freedom of Information Act should clarify that the requirements of the statute apply to independent agencies. We believe that the statute already does so because the current FOIA covers any "agency," which is defined by way of the D.C. Administrative Procedures Act to include "independent agencies." Nonetheless, if the Council believes that further clarification is warranted to ensure that the statute covers independent agencies, we support any such effort.

We also recommend that the Council amend the statute to clarify that it covers WMATA. In Kiska Construction Corp.-USA v. WMATA, 167 F.3d 608 (D.C. Cir. 1999), the D.C. Circuit recently concluded that WMATA is not an "agency" within the meaning of the D.C. FOIA. The Court based its decision on the legislative history of the D.C. Administrative Procedures Act, which contained

testimony from a principal drafter of the legislation stating that the definition of an "agency" was not intended to encompass WMATA. We believe that WMATA – one of the largest employers in the Washington metropolitan region – should be covered by the D.C. Freedom of Information Act and that exclusion of WMATA from coverage is contrary to the Council's intent in enacting the D.C. FOIA. We believe that this change in the law can be effectuated by amending the current definition of a "public body" as follows: "The term 'public body' means the Mayor, an agency, any interstate compact agency, or the Council of the District of Columbia." (Proposed new language underscored).

7. Mandatory Training. The Post recommends that the Council consider adopting mandatory FOIA training requirements for all public officials responsible for FOIA compliance.

# **The Common Denominator**

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*Washington's Independent Hometown Newspaper*

TESTIMONY BEFORE THE  
COMMITTEE ON GOVERNMENT OPERATIONS  
COUNCIL OF THE DISTRICT OF COLUMBIA  
October 12, 2000

Good afternoon, Chairman Patterson and members of the committee.

My name is Kathryn Sinzinger. I am the editor and publisher of The Common Denominator, Washington's Independent Hometown Newspaper.

As you know, The Common Denominator is the only general circulation newspaper that focuses its news coverage exclusively on the District of Columbia and, in particular, the District of Columbia government. As part of the mainstream press, we take seriously our constitutional responsibility to inform the public about the actions of their government. Access to public information is vital to carrying out our First Amendment-protected function.

Before founding The Common Denominator in 1998, I worked as a reporter or editor – primarily at daily newspapers – in Ohio, Illinois, Iowa, Maryland and Virginia, and in the District of Columbia as a Washington correspondent. I am a former chairman of the Freedom of Information Committee of the Cleveland Chapter of the Society of Professional Journalists. I have used Freedom of Information laws numerous times during my professional career to compel government disclosure of public information, and I continue to do so today as a member of the working press.

Regrettably, the District of Columbia – our nation's capital – is the *only* jurisdiction in which I have ever had a problem gaining access to public information through the use of Freedom of Information laws. While FOI laws are used in other parts of the United States as a citizen's "last resort" when government refuses access to public information, the D.C. government often uses FOIA as an excuse to delay or otherwise impede the free flow of what should be readily available public information.

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At The Common Denominator, we have found it to be routine for some D.C. government employees to require a written request that cites the Freedom of Information Act as justification for the release of *any* public documents. We have found D.C. government departments and agencies to be fairly arbitrary and wholly inconsistent in how they decide when a FOIA request is necessary. We have found the D.C. government to generally ignore compliance with the 10-day requirement for response to a FOIA request. In one instance, the Metropolitan Police Department took four months to provide an initial response. We still have not received the statistics we requested from MPD in October 1999.

We also have found it is sometimes more difficult for working journalists than for the average citizen to obtain public information from the D.C. government. As an example, I was told about a year ago by an employee of the Office of Boards and Commissions that she could not give me the names of the members of a city board because she was not authorized to speak with the press and no one who was authorized to do so was in the office at the time. When I inquired how her response would differ if I made the request as a D.C. resident, homeowner, voter and taxpayer, her response changed to: "Then I guess I have to tell you." It should not make a difference who is requesting public information. Public information is just that – public – and a request for it should be met with compliance.

While we applaud the council's desire to extend FOIA's provisions to include electronic information and government information that is maintained by private contractors, we are concerned that a lack of uniform compliance by the D.C. government – which defeats the purpose of the Freedom of Information Act – will simply mean you are adding more provisions to a law which the government will continue to ignore.

We urge the council to consider a more comprehensive revision of the District of Columbia's Freedom of Information Act to clearly state that government information belongs to the public and that access should be denied only in limited, enumerated instances. As currently worded, the Act emphasizes denial of access and gives some government employees the impression that the only government information accessible to

the public is that which is specifically enumerated in the law. This violates the spirit of “open government” as it is understood in other parts of the country.

While FOIA and public records are the subject of this hearing today, we also urge the council to review the District’s other major “open government” law, which relates to open meetings of government bodies. While council members often talk about democracy in terms of what Congress and the federal government need to do to respect D.C. citizens’ rights, the D.C. Council has the ability to foster greater citizen participation in public affairs by opening the doors that shroud local government debate in secrecy. Other jurisdictions across this country require almost all discussions of the public’s business to take place in public meetings. The District requires only that a final vote be taken in public.

As currently written, D.C.’s open records and open meetings laws fail to compel the government to truly involve the public in the public’s business. Without an informed and active citizenry, democracy cannot thrive.

October 12, 2000

TO: Councilwoman Kathy Patterson/Chairman, Committee on Government Operations

FROM: Kathy Sinzinger/The Common Denominator (v-635-6397; f-635-1449;

EditorCD@aol.com)

RE: Today's FOIA hearing

Hi, Kathy

Just a note, with an observation after I left the hearing today and was watching part of Arabella Teal's testimony before your committee. (By the way, I have found Arabella to be one of the few government employees I've encountered who goes out of her way to try to be helpful to the press.)

It strikes me that this entire discussion of government compliance with FOIA requests has been missing a basic point – FOIA originally sprung out of a movement to create an *appeals process* for the public to use when the government refuses requests for information. What is getting lost in the way the D.C. government administers FOIA is that the law assumes the government is attempting to provide public information without FOIA being invoked.

In other words, if the government is doing a good job of providing public information when it is requested, there should be few requests made under FOIA – because it would mean the public doesn't need to invoke the appeals process.

And the success of "open government" would be measured more appropriately by 100% DENIAL of FOIA requests, rather than 100% compliance – meaning that the government was correct in initially denying a request for information that could legally be withheld from the public.

A FOIA request, as the law was originally intended, is an appeal after an information request has been denied. For any employee of the D.C. government to actually *require* the use of FOIA is ludicrous.

The culture of secrecy needs to be changed so that routine FOIA requests are unnecessary. Creating a whole FOIA-related bureaucracy or enlarging the one that already exists is a colossal waste of taxpayers' money.



00 00:12 P4:54

WESLEY PRUDEN

EDITOR IN CHIEF

'00 OCT 19 P4:25

# The Washington Times

3600 NEW YORK AVENUE N.E. WASHINGTON, D.C., 20002

## TESTIMONY TO THE D.C. COUNCIL

BY WESLEY PRUDEN,  
EDITOR IN CHIEF OF THE WASHINGTON TIMES,  
IN SUPPORT OF D.C. COUNCIL BILL 13-829, "FREEDOM OF  
INFORMATION AMENDMENT ACT OF 2000"

October 18, 2000

The Washington Times supports passage of the proposed amendments to strengthen, clarify and update the District's Freedom of Information Act. This written statement is submitted for inclusion in the official record on Bill 13-829 before that record closes on Oct. 19.

Over the years, The Washington Times has encountered widespread ignorance, misunderstanding or misapplication of the FOIA among city employees at all levels and across all agencies, including independent agencies such as the public schools and UDC. (If anything, compliance in the school system is even worse than in D.C. government.)

Public employees and officials routinely rebuff requests by our reporters for basic public information (such as an employee's job title, salary, length of service or telephone number), often requiring that the requests be put in writing. Once written requests are submitted, compliance with the law's stated deadlines and standards for withholding information is spotty at best. This kind of runaround must be even more frustrating for the typical private citizen without his or her own printing press.

The Times believes that D.C. Council member Kathy Patterson's proposed amendments are reasonable, practical vehicles to:

- increase employees' understanding of and compliance with the Freedom of Information Act.
- specify that the D.C. Council is covered by the act.

- expand the definition of "public record" to include electronic documents and those records kept by contractors doing city business.
- ensure that agencies make every effort to provide information in the format requested.
- require agencies to cite the legal justification for deleted or redacted portions of released material and to describe the extent of such deletions.
- provide for routine posting on a government Web site(s) of routinely requested information such as listing of agency personnel and commission members, job titles, salaries and phone numbers.
- make violation of the act by government employees a misdemeanor punishable by a fine of up to \$100.
- require annual, public reports from the mayor and corporate counsel detailing the outcome of all requests for disclosure of public records during the previous fiscal year.

The Times also urges the Committee on Government Operations and the D.C. Council as a whole to consider several additional ways to tighten the proposed amendments or existing law by:

- codifying a requirement that all public employees be trained to understand and comply with FOIA provisions ("knowing" violation of the law is a tough hurdle during prosecution when employee ignorance is rampant).
- specifying additional administrative remedies, including mandatory retraining and letters of reprimand, that may be applied for employees who violate the law.
- requiring that the proposed annual reports draw conclusions and make recommendations on the quality of individual agencies' compliance with the law, rather than simply assemble data.
- clarifying that "independent" agencies of city government, such as the public schools and UDC, are covered by the law.
- providing that the procurement officer or other designated official within each agency - not a private contractor - is responsible for compliance with the law as it pertains to information held by a contractor or any other entity using



public funds to perform specific functions for the city.

Thank you for the opportunity to comment on this important legislation.

Testimony of  
**Robert S. Becker**  
On behalf of  
The Society of Professional Journalists  
D.C. Professional Chapter  
October 12, 2000  
Before the Council of the District of Columbia  
Committee on Government Operations

**Bill 13-829 — Freedom of Information Amendment Act of 2000**

Thank you very much for inviting me to address you on behalf of the Society of Professional Journalists' D.C. Professional Chapter. I am the chapter's freedom of information chair and a member of SPJ's national Freedom of Information Committee representing the mid-Atlantic region. I assist journalists seeking information under the D.C. and federal open records laws, and I use both statutes in my law practice to obtain information to assist clients.

My experience with the D.C. law is that it functions erratically and slowly. My sense is that it functions erratically because the individuals charged with implementing it are not aware of its provisions, are inadequately trained in dealing with public disclosure of government information, or have FOI as but one of several duties within the agency.

It operates slowly because the day-to-day functioning of the agency takes a higher priority for agency heads and employees involved in public disclosure, and sometimes because requests are sent out of an agency to the assistant corporation counsel charged with handling its legal matters. The attorney then must go back to an agency employee to get the information requested before it can be disclosed.

That brings me to the two issues I would like to focus on today. One is the sanctions provision in the proposed bill, which I believe is a good start but has some problems. The second is a proposal aimed at reducing the risk that employees will be sanctioned and improving government response to FOI Act requests. It would involve

creation of an autonomous office to provide training to the City Council and executive branch agencies charged with implementing the open records law, to act as an adviser to agencies on disclosure policy, and to serve as an ombudsman in an effort to resolve disputes over disclosure.

Two forms of sanctions help to ensure agency compliance with the open records law. The current D.C. statute includes one of them. Like its counterparts in the vast majority of states, it permits information requesters who win litigation over agency access denials to collect reasonable attorney's fees and costs.<sup>1</sup>

But the up-front cost of litigation is prohibitive for most requesters. Even if a requester can afford a court challenge, in most cases the time delay between request and disclosure following a court victory — six months, a year, two years — renders the information valueless. Thus, as a practical matter, there is currently no effective deterrent in the D.C. open records law against negligent or even willful violation by agencies and their employees in nearly all open records cases.

The proposed amendments would remedy this problem by imposing sanctions on agency employees who deliberately, or through neglect of duty, deny or delay disclosure of public records. If this amendment is adopted, D.C. would join 22 states that already have statutes imposing criminal sanctions, some including jail time, or civil penalties against individual government employees for failure to disclose information under open records laws. In Maryland a person who violates the open records act may be convicted of a misdemeanor and fined up to \$1,000.<sup>2</sup> Virginia imposes civil penalties ranging from \$25 to \$1,000 on individual members of public bodies responsible for violations of the open records law.<sup>3</sup>

Some of the states, including Rhode Island and Wisconsin, also permit monetary sanctions against agencies for willful or arbitrary nondisclosure, and a few states,

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<sup>1</sup> D.C. Code § 1-1527(c).

<sup>2</sup> Md. Code Ann. § 10-627(b)

<sup>3</sup> Va. Code Ann. § 2.1-346.1

Michigan for example, permit such penalties against agencies, but not against individual employees.

But the proposal has a major flaw. As I noted a few minutes ago, D.C. government agencies often delegate the duty to respond to FOI Act requests to the Office of the Corporation Counsel, the entity that would be charged with prosecuting violations of the law. Unless the Council mandates that agencies designate their own employees as FOI officers or establishes a separate prosecuting entity for FOI Act cases, this provision creates an untenable situation in which the Corporation Counsel likely would be prosecuting one of its own employees for violating the open records law. Insisting that agencies handle FOI Act requests internally might have the desirable effect of facilitating request processing, but establishing a prosecutor solely to handle FOI Act violations is not a reasonable alternative.

That brings me to an approach I strongly believe will improve compliance with the FOI Act, reduce the likelihood that employees will be sanctioned, and provide a forum for ongoing review of and improvement to disclosure policy within the District government. The Council should establish an autonomous office with sufficient stature that its director is on an equal footing with executive branch agency heads and senior Council staff. Its mission would be to educate Council members and their staffs, agency heads and their designated disclosure officers on the requirements of the open records law, to issue advisory opinions in response to specific information requests, to monitor trends in information requests and responses, and to recommend improvements in disclosure practices and mechanisms (i.e. the Internet).

This office would provide outreach to the requester community, offering training to FOI Act users in an effort to help them use the law more efficiently. By helping requesters narrow requests, the office could reduce the amount of government employee time expended responding and reduce disclosure delays.

Currently five states have full-time offices like the one I am proposing.

Legislation passed last session in the Virginia General Assembly established the newest of these, the Virginia Freedom of Information Advisory Council. It is a legislative agency staffed by an attorney who is its executive director. The FOI Advisory Council is made up of members appointed by the governor and leaders of both legislative chambers and includes legislators, agency employees and representatives of the requester community.<sup>4</sup>

In designing its two-year pilot project, Virginia followed the model established in New York 25 years ago for its Committee on Open Government, which receives 8,000 calls and issues 400 advisory opinions annually.<sup>5</sup> It provides advice to callers from within and outside the government verbally and in the form of written, non-binding opinions interpreting the state's open records, open meetings and personal privacy laws.

Among the five states with similar agencies, Connecticut has provided its Freedom of Information Commission with the most far-reaching powers.<sup>6</sup> The agency hears complaints concerning denials of access to government information and meetings, and issues binding orders requiring disclosure. If a government entity took action in a closed meeting in violation of the open meetings law, the Commission can void such actions. It is also charged with litigating in defense of its disclosure decisions when they are challenged in court by government entities, and with providing public education about state disclosure laws.

I believe an office can be established to provide advice and training here at reasonable cost, and I would be happy to work with you to develop a viable proposal that meets the needs of the D.C. government and users of its FOI Act.

Having compared the proposed amendments to current law I would like to suggest a few clarifications. In D.C. Code § 1-1502 you have proposed bringing the City Council

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<sup>4</sup> For more information see <http://opengovva.org>.

<sup>5</sup> For more information see <http://www.dos.state.ny.us/coog>. Hawaii's Office of Information Practices provides similar services. See <http://www.hawaii.gov/oip/>. Indiana has recently established the Public Access Counselor to provide formal and informal advice concerning the state's open meetings and records laws and public education. See <http://www.state.in.us/pac/>.

<sup>6</sup> For more information see <http://www.state.ct.us/foi/>.

under the FOI Act, a commendable decision. Throughout the FOI Act you would replace the phrase "the Mayor and/or an agency" with the phrase "public body" to signify the Council's inclusion. However, in § 1-1522(b) the amended version would state that "The public body may establish and collect fees not to exceed the actual cost of searching for or making copies of records," implying at least that each agency will set its own fee schedule. The section goes on to state that "Documents may be furnished without charge or at a reduced charge where the public body determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public." Again, the inference is that agencies will set their own standards for fee waivers and reductions. There should be a government-wide fee structure and a uniform standard for agencies to apply in assessing requests for fee waivers. At present it would appear that such a change would merely eliminate the possibility that a requester could be charged 10 cents a page for copies by one agency and 50 cents a page by another. This change will become more important with the implementation of EFOIA, because agencies, allowed to set their own fee schedules, may come to significantly different assessments of the cost of complying with requests for comparable volumes of data provided on computer disks or tape.

I have two suggestions for further amendments to § 1-1528. The amended version imposes on the Mayor broader reporting requirements concerning implementation of the FOI Act. Having included the City Council under the act, it seems to me, there should be a provision stating that the Council will issue its own annual reports on compliance or that it will submit information to the Mayor for inclusion in his or her annual report.

My second request is for inclusion of another statistic in the report, a tally of the number of requests to which agencies responded within time limits and the number of requests to which they did not. Where agencies failed to respond within time limits there should be explanations for the delays. This information will help in addressing resource allocation issues related to the government's disclosure function.

Thank you again for inviting me to testify today and for your efforts to improve public disclosure of information under the D.C. Freedom of Information Act. The D.C. Chapter of the Society of Professional Journalists and I would welcome the opportunity to assist and advise you through the remainder of the legislative process and on implementation of the amendments.

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The Society of Professional Journalists is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ also promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press. The D.C. Professional Chapter, with members representing local and national news media, is its largest chapter with more than 360 members.

For additional Information: (202) 364-8013



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HEALTH INSURANCE COUNSELLING PROJECT  
IMMIGRATION  
SMALL BUSINESS  
VACCINE INJURY PROJECT

**BEFORE THE DISTRICT OF COLUMBIA CITY COUNCIL  
COMMITTEE ON GOVERNMENT OPERATIONS**

TESTIMONY OF PROFESSOR JEFFREY S. GUTMAN  
PROFESSOR OF CLINICAL LAW AND  
ASSISTANT DEAN FOR ACADEMIC AFFAIRS  
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

**PREFACE**

Thank you for the opportunity to address the Committee regarding the District of Columbia Freedom of Information Act (DCFOIA) and recently proposed legislation to amend the Act.<sup>1</sup> The promise of the DCFOIA is to pierce the veil of government secrecy, to expose the work of the government to public scrutiny, and to ensure an enlightened citizenry capable of participating meaningfully in the affairs of government and of promoting reform when it fails us. See Washington Post Co. v. Minority Business Opportunity Comm'n., 560 A.2d 517 (D.C. 1989). In my view, the DCFOIA frequently falls short of this promise not because its exemptions from disclosure are too broad, but because executive branch agencies commonly ignore it.

Why it is often so difficult to pry records loose from city agencies is a matter of speculation. I suspect that it is a combination of three factors: 1) a culture of non-responsiveness, 2) the absence of resources, training and institutional commitment to adhere to the FOIA and 3) a sheepish hesitancy to admit that records are either missing or in disarray. I offer below a couple of cautionary tales from my own experience and some concrete recommendations for statutory reform that build upon the excellent legislative proposal just introduced by Councilmember Patterson.

I should note at the outset, in fairness, that it may be that my experience, with the Department of Employment Services and the Department of Human Services, is somewhat idiosyncratic. I have reviewed a chart prepared by Councilmember Patterson's Office based on

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<sup>1</sup> I will not specifically address the open records statute relating to the Metropolitan Police Department, which predates the DCFOIA. D.C. Code § 4-135.

reporting from many of the city's Departments and agencies. The Department of Employment Services is notably absent from the chart. The Department of Human Services appears to have denied nearly half (18) of the requests received, yet claims to have invoked FOIA exemptions only seven times. Many other agencies, however, appeared to receive very few requests or were apparently quite forthcoming with records requested.

The report and chart leaves many questions unanswered. How many of these requests were responded to within ten days? How many of the responses came only after follow up phone calls, letters, pressure from the Council, administrative appeals or litigation? How many of the requests were investigative rather than personal in nature?<sup>2</sup> And, I must say that I am somewhat skeptical that less than 2% of the 3430 requests received did not apparently generate a response.<sup>3</sup> In any event, it should come to no surprise that some agencies are apparently better than others in FOIA compliance. But, the report does seem to offer some welcome news. Many agencies appear now to have designated FOIA officers and, overall, the percentage of granted requests is quite high. In my view, all Departments and agencies should be held to a high standard of compliance with the DCFOIA. The recommendations below are directed to that end.

#### PERSONAL EXPERIENCE WITH THE DCFOIA

Before I joined the faculty at GW, I served as a Trial Attorney with the Federal Programs Branch of the Civil Division of the U.S. Department of Justice. Among other things, I litigated FOIA cases and advised agencies about the federal FOIA. Although agencies of the federal government frequently refused to disclose documents based upon asserted exemptions from disclosure set forth in the federal FOIA, most agencies readily recognized that there was a general right of public access to government information and established systems to respond to FOIA requests. Generally, federal agencies take the FOIA seriously.

My sense is that some D.C. government agencies lack a similar culture. Public access to information is seen not as a public right, but an annoyance best ignored. Because of a lack of

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<sup>2</sup> Based upon the numbers of FOIA requests filed with the agencies reported, my guess, and its only a guess, is that the high rate of favorable responses is due in part because a sizeable percentage of the requests were for a small and discrete set of records about the requester. I assume, for example, that most of the 380 requests of the Department of Motor Vehicles were filed by requesters who sought their own car registration and infraction records, perhaps for insurance or employment purposes. That all the requests were granted is good, but expected. The true test of a FOIA is how agencies handle investigative FOIA requests, those that seek documents relating to the operation of government agencies and programs. I would expect that such requests, and mine of the Department of Employment Services were among them, are less likely to be greeted with a timely and complete response.

<sup>3</sup> Perhaps this is the 64 requests designated "other" by the report.

resources, training or institutional commitment, some agencies seem to lack regularized processes for responding to FOIA requests on a timely basis. In order to receive a FOIA response, not only does one need to write a letter, but one needs to identify and lobby agency officials to provide a timely response. Even that approach is often unsuccessful.

For example, when the Department of Human Services denies, suspends or terminates benefits, such as Food Stamps, TANF and Medicaid, it typically, but not always, sends a notice that indicates the basis for the action as "Manual Citation [xxxx]." These forms do not indicate what the Manual is or explain the provision relied upon in taking adverse action against the claimant or beneficiary. The claimant or beneficiary, as well as their representative, is offered no notice as to the basis of the Department's action.

In 1996, I filed a FOIA request for the Manual referred to in the notices. Despite subsequent letters and calls, I never received a response despite the fact that the Manual was quite obviously required to be made available to the public pursuant to D.C. Code § 1-1526(2). Having heard nothing from the Department's General Counsel's Office, I filed a lawsuit in Superior Court in which I asked the Court to declare that the Department violated the FOIA by failing to disclose the document and to require the Department to furnish me a copy of the manual. The Corporation Counsel's Office defended the case vigorously, asserting in its answer to my complaint that it had failed to state a claim for which relief could be granted. After several status conferences in which the judge strongly suggested that the Department provide me the Manual, the government ultimately signed a consent judgment and the Manual was furnished some weeks later. The Department of Employment Services similarly ignored two FOIA requests I filed for information about the disability compensation program in 1998 and 1999.

I tried a different approach with respect to a FOIA request recently filed on behalf of a client whose General Public Assistance benefits had been wrongfully withheld by the Department of Human Services. When DHS responded to my request in part and failed either to provide or to refuse expressly to disclose documents I reasonably believed existed, I filed an administrative appeal with the Mayor's Office. No response was forthcoming within ten days as required by D.C. Code § 1-1527(a). Rather, the Director of the office handling the appeal explained well after the deadline that my appeal had been lost and that his office was woefully understaffed. It appears that the office that might serve to ensure that the city's departments and agencies comply with the FOIA lacks the necessary staff or direction to do so.

A public information access system that functions in part through lobbying, persistence and litigation is certainly not what the Council had in mind when it enacted the FOIA in 1968. At least as to some agencies, the FOIA has become an unfortunate example of what occasionally plagues our government: a progressive and far-sighted piece of legislation that is a struggle for its beneficiaries to enforce. Remedial legislation, however, can create incentives, impose requirements and establish oversight to help insure that the promise of the DCFOIA is realized.

While the electronic access provisions of the proposed legislation are important, they can

only be effective if the Departments and agencies respond timely to requests for records. For that reason, it is essential that Departments and agencies create regularized systems, managed by well-trained FOIA officers or records custodians, to respond to public requests for information, to make such officers accountable for failures to comply with the FOIA, and to establish independent monitors to ensure compliance.

The approach taken in section 3 of the proposed legislation, to impose a criminal penalty upon persons “knowingly and willfully” violating the DCFOIA is commendable and has been adopted in several other states, such as Arkansas,<sup>4</sup> Florida<sup>5</sup> and Virginia. Yet, a records custodian can only “knowingly and willfully” violate the DCFOIA if he or she is aware of the FOIA and its requirements and internal systems established to process timely FOIA requests. Without such knowledge, the threat of a criminal penalty based on scienter is rather hollow.

Below, I offer several recommendations, when, combined with the proposed criminal penalty provision, serve to enforce the FOIA. Following those recommendations, I offer some additional, but more technical comments on the proposed legislation itself.

## SUBSTANTIVE RECOMMENDATIONS

### Recommendation 1

Unlike the federal FOIA, 5 U.S.C. § 552(a)(1)(A), the DC FOIA lacks any requirement that public bodies publicly identify their FOIA officers and their addresses. I understand that the Mayor has recently issued an Executive Order requiring agencies to designate a FOIA officer. This is significant, because it places responsibility and accountability with identified individuals. If the names and addresses of these individuals are not readily accessible, members of public seeking information are likely to submit FOIA requests to the wrong office or address. Without an effective means to redirect misfiled FOIA requests, responses to such requests are unlikely. Consequently, I would recommend adding a new section, D.C. Code § 1-1522(b), modeled after 5 U.S.C. § 552(a)(1)(A), that provides as follows:

“Each public body shall publish quarterly in the District of Columbia Register and shall otherwise make publicly available, including by electronic means, descriptions of its organization, the

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<sup>4</sup> In Arkansas, interestingly, it is a misdemeanor even to negligently violate the state FOIA. Punishments shall not exceed \$200 or 30 days in jail. Ark. Code Ann. § 25-19-204. Indeed, the records custodian has 24 hours to determine whether requested documents are exempt from disclosure. *Id.*, § 25-19-105(c)(3)(A).

<sup>5</sup> In Florida, penalties include suspension, removal or impeachment from office for knowing violation of the FOIA. Fla. Stat. Ann. § 119.02.

established locations at which it maintains its employees and the names, business and e-mail addresses and telephone numbers of the employee or employees (hereinafter referred to as the FOIA officer or officers) to whom a member of the public may submit a request under this subchapter or otherwise seek access to public records.”

## Recommendation 2

These newly appointed FOIA officers require training in four areas. First, the officers need to understand and learn to apply the provisions of the DCFOIA, the relatively few cases decided under the DCFOIA and any internal guidance or advisory opinions that have been written by the Mayor’s Office or Corporation Counsel’s office. Second, these FOIA officers need to establish regular systems for retrieving documents. Third, and perhaps most important, these FOIA officers need to play an active role in coordinating with the Public Records Administrator, see D.C. Code § 1-2901 et seq., to ensure the development of internal records management procedures designed to retain active documents in an orderly manner. Fourth, the FOIA officer must be aware of the private contractors serving governmental functions for their Department or agency whose records would be subject to the FOIA if the proposed legislation is enacted.<sup>6</sup> The FOIA officer should establish a relationship with a document management specialist at the contractor to make sure that public records are retained and accessible if they are requested.

An independent, high-level office within the executive branch should be established to play a training, oversight and ombudsman role. The following recommendation is modeled on legislation, Ind. Code Ann, § 5-14-4, in effect in Indiana:<sup>7</sup>

Section 1. The Office of the Public Access Director is established. The Mayor shall appoint a Public Access Director for a term of four years at a salary fixed by the Mayor. The Mayor may remove the Public Access Director for

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<sup>6</sup> I support the proposal to include government contractors within the ambit of the FOIA. As more and more important government functions are contracted out to private concerns which are not directly accountable to the voter and taxpayer, the FOIA can be an important tool in ensuring some oversight and accountability of these private entities.

<sup>7</sup> A somewhat different approach was taken recently in Virginia. Virginia has established a twelve person Virginia Freedom of Information Advisory Council, an advisory council in the legislative branch, designed to encourage and facilitate compliance with the Virginia FOIA. The Council issues advisory opinions and guidelines, conducts training seminars for the public and government staff, publishes educational materials and reports on its activities to the legislature. Va. Code Ann. § 2.1-346.2, 2.1-346.3.

cause. If a vacancy occurs in the office, the Mayor shall appoint an individual to serve for the remainder of the Director's unexpired term.

Section 2. The Public Access Director shall be an attorney with active membership in the District of Columbia Bar. The Director shall apply his or her full efforts to the Office and may not be engaged in any other occupation, practice, profession or business. The Public Access Director may employ additional personnel necessary to carry out the functions of the Office.

Section 3. "Public access laws," includes D.C. Code § 1-1504, D.C. Code § 1-1521, et seq., D.C. Code § 4-135 and any other statute which purports to provide public access to meetings or records of public bodies.

Section 4. The Public Access Director shall have the following powers and duties:

(1) To establish and administer a program to train FOIA officers and other public officials on the rights of the public under the public access laws;

(2) To establish and administer a program to educate the public on its rights under the public access laws;

(3) To conduct research and make recommendations to the City Council to improve the public access laws;

(4) To prepare interpretive and educational materials;

(5) To prepare advisory opinions at the request of public bodies;

(6) To respond to informal inquiries or requests by the public for assistance in obtaining access to public meetings or public records;

Section 5. An informal inquiry or request for assistance shall not toll the statute of limitation that applies to a lawsuit filed under D.C. Code § 1-1527(b).

Section 6. The Public Access Director shall submit a report to the Mayor and the City Council not later than September 30 of each year concerning the activities of the Office for the previous year, including, but not limited to:

(1) The Office's training and educational activities;

(2) The number of advisory opinions sought by each public body and the average time taken to respond to these requests;

(3) The number of inquiries for assistance made by members of the public;

(4) The number of inquiries resolved;

- (5) The number of appeals received:
- (6) The number of appeals resolved within 10 days.

I should note that, although the Council's current concern is with the DCFOIA, the Public Access Director proposed above also has jurisdiction over both other public access to records statutes and matters relating to the public access to meetings.

### Recommendation 3

The Public Access Director proposed above should field the administrative appeals now handled by the Mayor's Office. I have not done so below, but this section might be expanded to include appeals of denials or non-responses to requests for access to public meetings. Therefore, I would recommend amending D.C. Code § 1-1527 as follows:

- (1) All references to the "Mayor" in subsection (a) shall be replaced by "Public Access Director." ("Mayor" in D.C. Code § 1-1522(e) should also be replaced by "Public Access Director.")
- (2) Subsection (a) should be amended to include "within thirty days of the denial or failure to make a timely response under D.C. Code § 1-1522(c) or (d)" after "Public Access Director."
- (3) Subsection (a) should be amended to make it clear that an administrative appeal is not required prior to filing suit and that making such an appeal does not toll the statute of limitations applicable to such a lawsuit.

### Recommendation 4

The federal FOIA, 5 U.S.C. § 552(a)(2), contemplates that certain records be made publicly available and that an express request not be required to access them. The DCFOIA seems to do the same thing, but in a rather odd way. D.C. Code § 1-1522(a) permits public access to all public records, unless exempt pursuant to D.C. Code § 1-1524, upon written request. See D.C. Code § 1-1522(b), (c) (referring to requests). D.C. Code § 1-1526 specifically identifies eight (and the proposed legislation adds two) categories of records that are "specifically made public information." For § 1-1526 to have any meaning and import separate from § 1-1522(a), it must direct public bodies to have these categories of materials publicly available without need for a request.

The DHS manual described above would be such a document, but my experience confirmed that D.C. agencies generally do not have public reading rooms for these categories of documents as their federal counterparts generally do. To make this clear, § 1-1526 should be amended to read:

“Without limiting the meaning of other sections of this subchapter, the following categories of information are to be made publicly available in one or more public reading rooms and, by [date] in on-line reading rooms:”

I would think that a public reading room could be established at the Judiciary Center building and at one or more public libraries.

While the suggestion here is a rather technical change, if a change at all, it does highlight an important principle. To some extent, resort to a formal written FOIA request reflects a failure of the government either to furnish important material to the public as an ordinary course of business or a failure to respond to informal requests for information, or both. The more government records are available to the public for inspection and copying, the less the need for the DCFOIA to enforce the public right to those records.

#### Recommendation 5

To make this reading room somewhat more user friendly, I would amend the proposed amendment, Sec. 2(3)(a)(10), to require public bodies to have an index of all materials in the reading room, not just those listed in (a)(9).

### TECHNICAL RECOMMENDATIONS

#### Recommendation 6

Because the DCFOIA is largely framed as a direction to the Mayor and agencies to act, it would be clearer to define the term “public body” in the proposed D.C. Code § 1-1502(18) to include all entities that have a duty to respond under the DCFOIA. Redefining “public record” to include that of contractors, for example, is an indirect way of expanding the scope of the FOIA without making it clear that the FOIA imposes duties on them. Therefore, I would define “public body” as:

(18) The term “public body” means the Mayor, an agency, the Council of the District of Columbia and such private persons, firms, corporations or other private entities which perform a service or function on behalf of the Mayor, an agency or the Council of the District of Columbia.

To make it quite clear that only documents relating to the public function and not the firm’s entirely private function, are subject to FOIA, the term “public record” might be amended to read:

“Public record includes all books, papers, maps, photographs, cards, tapes, recordings or other documentary materials, including those received, created or stored on magnetic or electronic media, regardless of physical form or characteristics, that are created, received,

used or in the possession of a public body. Public record does not include the records of private persons, firms, corporations or other private entities that do not relate to a service or function performed on behalf of the Mayor, an agency or the Council of the District of Columbia.”

#### Recommendation 7

I quite agree that the City Council should be included as a public body subject to the FOIA. Interestingly, however, the provisions of the public records management law, D.C. Code § 1-2901, et seq expressly do not apply to the City Council. D.C. Code § 1-2914(b)(1). To ensure access to semi-current and inactive records of the City Council, that provision should be deleted.

#### Recommendation 8

Because the proposed definition of “public body” has been expanded to include the City Council, D.C. Code § 1-1527(a), governing administrative appeals, should probably be amended. In Recommendation 3, I suggested that the Public Access Director decide the non-mandatory FOIA appeals. The City Council may prefer that a legislative branch entity, such as the Office of the Counsel to the City Council, rather than one in the executive branch, serve that function for FOIA requests of the City Council.

#### Recommendation 9

The term “public body” should replace the term “agency” in the proposed legislation, Secs. 2(1), (3)(a)(9) and (5)

#### Recommendation 10

The reporting requirements set forth in proposed D.C. Code § 1-1528 are essential for proper oversight of the implementation of DCFOIA. I understand, however, that until recently the Mayor rarely made such reports. The Council will need to be vigilant in its efforts to ensure that the Mayor complies with these reporting requirements.

In addition to those reports indicated, I would add the following:

- (1) The number of request for records received by the public body which were not followed by the requested disclosure or written rationale for non-disclosure within a) 10 days or b) within 20 days if the public body invokes D.C. Code § 1-1522(d);
- (2) The number of employees found guilty pursuant to D.C. Code § 1-1527(d).
- (3) A statement of the training afforded the public body’s FOIA officer and other relevant staff.
- (4) A description of its records management and retention program.

### Recommendation 11

Although I am not at all sure that this has ever been an issue, it seems appropriate to expand the exemption in D.C. Code § 1-1527(3)(F) beyond law enforcement personnel to any individual.

Thank you for allowing me the opportunity to offer these recommendations. I hope that they are useful to you in your consideration of amendments to the DCFOIA.

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Testimony

before

The Committee on Government Operations

of

The City Council of the District of Columbia

by

Rebecca Daugherty, Director  
Freedom of Information Service Center  
Reporters Committee for Freedom of the Press

October 12, 2000

Councilmember Patterson, members of the Committee on Government Operations, thank you for the opportunity to comment today on the District of Columbia's Freedom of Information Amendment Act of 2000, Bill 13-829.

The Reporters Committee for Freedom of the Press is a small public interest group dedicated to helping reporters across the country exercise their First Amendment and freedom of information rights to gather and cover the news. The Reporters Committee, which is now located in Arlington, Va., also publishes numerous publications, including a quarterly journal, *The News Media & The Law*, and a bi-weekly newsletter, *News Media Update*. We are presently working on our fourth edition of *Tapping Officials' Secrets*, a 50-State and District of Columbia compendium of open records and open meetings laws; and we publish other open records guides including *Access to Electronic Records in the States* and *Police Records, A Guide to Effective Access in the 50 States and D.C.* Most of these publications are available free on our Web site, [www.rcfp.org](http://www.rcfp.org), as well as in hard copy.

I have been the director of our FOI Service Center for nearly 14 years and in that time I have tried, frankly with little success, to help numerous reporters and individuals obtain records under the District of Columbia's FOI Act. They have encountered reluctance in the extreme from officials in charge of the records they seek, and they rarely gain the records the Act says they can have. As a resident of the District of Columbia for more than a quarter of a century, I am confident that District residents are vitally interested in the workings of their government and want to be knowledgeable participants in a democratic form of government.

Instead they have largely been ignored when they filed requests. Sometimes, even when an agency records keepers admit that records exist, they lose the requests, transfer the requests, claim that they were not allowed to give records out or give other such non-responsive responses. Frequently they do not respond at all.

The FOI Amendment Act is, in our view, an excellent piece of legislation meant to give the citizens of the District of Columbia the rights to open records enjoyed by citizens in the states. It clarifies that information in new forms and formats is available to the public in a form each requester can use. It extends the reach of the Act to those contractors who spend the public's funds or carry out government business. It makes clear that the council itself is subject to the rules of openness. And it addresses compliance with the Act, through requirements for reports on adherence to the Act and through sanctions against employees who will not comply.

Most importantly, the Act signals to public bodies throughout the District that this Council intends for the District's citizens to have an open government. It will no longer tolerate the refusal of government workers to allow the public to know what the government is doing, or not doing, or to assess the information held in agencies. This bill makes clear that the government's business is everybody's business here, and that is the way it should be.

I would like to observe that the change to an open District may require some training and some incentives for records custodians. The sanctions outlined here are reasonable and hopefully effective. The fine is not abusive or prohibitive, but I would suspect that no one wants to lose money in order to thwart the law.

As a practical matter, secrets can become a way of life in agencies. No one grows up wanting to be an FOI Officer. Instead children learn, "Don't tell secrets out of school." There are no college students anywhere majoring in freedom of information. They are more likely to major in public relations or business or some other discipline where the diplomatic refusal to share information with "outsiders" is regarded as an art, an accomplishment. But in an open government, citizens are not "outsiders." That needs to be taught.

Fines are good teachers. The threat of prosecution can be a good teacher. Requirements to report on responses to FOI requests will also instruct agencies on how to handle FOI requests and comply with the law. But personnel probably need other training as well.

In several states the Office of the Attorney General provides regular training for employees throughout the state on enforcement of public records laws. The Justice Department also provides such training for government agencies, and sometimes invites groups representing requesters to participate. We would be happy to help in training, as we sometimes are invited to do by the Department of Justice, to help provide a users' perspective on Freedom of Information.

U.S. Attorney General Janet Reno has made adherence to the federal FOI Act a part of the regular personnel evaluation for Department of Justice employees. As a result, they know that one of the laws they need to enforce is the FOI Act.

#### Electronic Records Improvements

Although we are certain that the FOI law as it exists applies to electronic records, we commend the drafters of this bill for adding the requirement specifically. As more records become routinely automated in the District, we are certain that some agencies will question whether these new electronic records should be available just as paper records are.

We also welcome the requirement that agencies give requesters information in the format they request if the record is readily reproducible in that format. Automated records are much more useful to many requesters who should be able to enjoy the benefits of computerized research to the same extent that agencies benefit from automated information.

The requirements that agencies post and index information electronically will greatly enhance public access and use of District information, and will cut down on the need for FOI requests. We would suggest that agencies consult with the public about how it can best use electronic records posted on its behalf. For instance, many federal agencies have chosen to post information in a PDF format which can be useful and easily read for some purposes, but inhibits a user's ability to "crunch" data for research purposes.

We would note that, although federal agencies have not yet fully complied with the Electronic FOI Act of 1996, which makes similar requirements for affirmatively posting useful information, many of the people who have worked at making this information available electronically have enjoyed the exercise. They have identified information that the public routinely wants and needs and made it easily accessible. It can be a satisfying task that benefits both the public and the agency.

I would be happy to respond to any questions.

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October 19, 2000

Councilmember Kathleen Patterson  
Committee Chair  
Council Committee on Government Operations  
Council of the District of Columbia Government  
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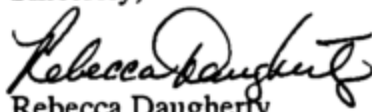
Dear Councilmember Patterson,

After listening to the testimony at last week's hearing, we are concerned that some testimony about the applicability of open records laws to government contractors may have been a little misleading.

We have surveyed this area of the law. We found 22 states that have, either by statute or case law, opened records of government contractors. We have attached an addendum to this letter summarizing the law of each of those states. The absence of language in statutes or case law does not necessarily mean that these records would be closed if contractors were directly performing governmental functions or spending taxpayer money.

We hope this is helpful to the committee and please let us know if we can provide any other information to the committee. Again, we greatly appreciated the opportunity to testify in favor of Bill 13-829 and your own efforts to reform Freedom of Information in the District of Columbia.

Sincerely,

  
Rebecca Daugherty  
Director, FOI Service Center

  
Catherine Cameron  
Jack Nelson Legal Fellow

## **State Law Opening Contractor Records to the Public**

### **Alaska**

Records that are “developed or received . . . by a public contractor for a public agency” are “public records” available for inspection and copying. AS 09.25.220(6) (2000).

### **Arkansas:**

Records of “any . . . agency wholly or partially supported by public funds or expending public funds” are subject to the open records act. Thus, the act applies to nongovernmental entities that receive public funds. *Arkansas Gazette Co. v. Southern State College*, 273 Ark. 248, 620 SW 2d 258 (1981).

### **Florida**

The law applies to nongovernmental entities that are “acting on behalf of any public agency.” Fla. Stat. Sec. 119.011(2) (2000).

### **Georgia**

Any entity, business, or organization that serves a public function, including any non-profit entity, is subject to the open records act’s requirements. *See Northwest Ga. Health Sys. v. Times-Journal*, 218 Ga. App. 336, 461 S.E.2d 297 (1995).

### **Hawaii**

An entity is subject to the open records law if it is an agency. An agency is defined as any unit of government which is owned, operated, or managed by or on behalf of a state or any county. *See East-West Center, OIP Op. Ltr. No. 92-2* (Mar. 4, 1992); Haw. Rev. Stat. Sec. 92F-3 (2000).

### **Indiana**

The definition of an agency subject to the open records law includes any entity or office that is subject to budget review by the State Board of Tax Commissioners or the governing body of a county, city, town, township, or school corporation, or subject to an audit by the State Board of Accounts. Under this definition, nongovernmental bodies receiving public funds or benefits would be subject to the Act. *See Masariu v. Marion Superior Court No.1*, 621 N.E.2d 1097 (Ind. 1993).

### **Iowa**

Governmental bodies cannot prevent the examination or copying of public records by contracting with nongovernmental bodies to perform governmental duties or functions. *See Iowa Code Sec. 22.2(2)* (1999). “In other words, a governmental body may not delegate or ‘contract away’ its duties or functions in order to avoid disclosure of what would otherwise be a public records.” *KMEG Television, Inc. v. Iowa State Board of Regents*, 440 N.W. 2d 382, 385 (Iowa 1989).

### **Louisiana**

Nongovernmental bodies receiving public funds are subject to the open records statute, to the extent that the records pertain to the receipt of public funds. *See* La. Rev. Stat. Ann. Sec. 17:3390 (2000).

### **Missouri**

Nongovernmental bodies receiving public funds or benefits are subject to the open records act if they are supported in whole or in part by public funds. *See* Mo. Rev. Stat. Sec. 610.010(4)(a) (2000). Additionally, Missouri makes open records of any entity that “has as its primary purpose to enter into contracts with public governmental bodies, or to engage primarily in activities carried out pursuant to an agreement or agreements with public governmental bodies.” Mo. Rev. Stat. Sec. 610.010(f)(a) (2000).

### **Nevada**

The open records act applies to educational foundations, university foundations and quasi-municipal corporations. *See* NRS 239.010(3)(b) (2000).

### **New York**

Nongovernmental bodies which act on behalf of governmental bodies or which perform and essential public service are subject to the open records law. *See Westchester Rockland Newspapers v. Kimball*, 50 N.Y. 2d 575, 408 N.E. 2d 904, 430 N.Y.S. 2d 574 (1980).

### **North Dakota**

The open records law covers “organizations or agencies supported in whole or in part by public funds, or expending public funds.” Letter from Attorney General Heidi Heitkamp to Representative Jennifer Ring (March 17, 1993) L-95; *Forum Publishing Company v. City of Fargo*, 391 N.W. 2d 169, 172 (N.D. 1986).

### **Ohio**

The Ohio Supreme Court has applied its open records laws to require public disclosure of records possessed, received, or created by private entities to which public offices had delegated the performance of public functions. *See State, ex rel. Fostoria Daily Review Co. v. Fostoria Hospital Ass’n*, 40 Ohio St. 3d 10, 531 N.E. 2d 313 (1988).

### **Oklahoma**

Any entity “supported in whole or in part by public funds” is subject to the open records act. 51 O.S. 24A.3.2 (1999).

### **Rhode Island**

Contractors may fall within the scope of the Rhode Island open records law as constituting a public or private agency, partnership, corporation or business entity acting on behalf of a public agency. *See* R.I. Gen. Laws Sec. 38-2-3(a) (2000).

### **South Carolina**

A body supported in whole or in part by public funds or one that expends public funds is subject to the open records act. *See* S.C. Code Ann. Sec. 30-4-20(a) (1999); *Weston v. Carolina Research and Development Foundation*, 401 S.E. 2d 161 (S.C. 1991).

### **Tennessee**

Tennessee courts have construed the open records act to cover the records of nongovernmental bodies in receipt of public funds and of advisory boards of quasi-governmental bodies. *See Creative Restaurants, Inc. v. Memphis*, 795 S.W. 2d 672 (Tenn. Ct. App. 1990).

### **Texas**

Texas attorney general opinions have found that an organization that "spends" or "is supported in whole or in part by," public funds is subject to the open records act. Tex. Gov. Code Sec. 552.003(1)(A)(x)(2000); Op. Tex. Att'y Gen. No. JM-821 (1987).

### **Utah**

The following records held by contractors have been made available under the open records law: documentation of the compensation that a governmental entity pays to a contractor or private provider, *see* Utah Code Ann. Sec 63-2-301(1)(j) (2000); records documenting a contractor's or private provider's compliance with the terms of a contract with a governmental entity, *see* Utah Code Ann. Sec 63-2-301 (2)(b)(2000); records documenting the services provided by a contractor or a private provider to the extent the records would be public if prepared by the governmental entity, *see* Utah Code Ann. Sec 63-2-301(2)(c) (2000); contracts entered into by a governmental entity, *see* Utah Code Ann. Sec 63-2-301(d) (2000). Also, Policy and Procedure No. 1-401 (7/86), approved by the Division of Archives, directs all contracts between state agencies and private providers should stipulate that the provider's records relating to the contract "are public and subject to the State laws governing public records."

### **Virginia**

Organizations that are supported "wholly or principally" by public funds are subject to the act Va. Code Ann. Sec. 2.1-341 (2000); 1995 Va. Op. Atty Gen. 4 (January 9, 1995).

### **West Virginia**

The open records act applies to "any other body ... which is primarily funded by [a] state or local authority." *4-H Road Community Association v. West Virginia University Foundation*, 182 W. Va. 434, 388 S.E. 2s 308 (1989).

### **Wisconsin**

The open records law opens all records held by a governmental agency to public inspection. *See* Wis. Stat. sec. 19.32; Wis. Stat. sec. 19.35. This would include any records pertaining to government contracts. In another law each governmental agency is required to “make available for inspection and copying under [the open records law] any record produced or collected under a contract.” Wis. Stat. sec. 19.36(3). Arguably, this statute places an extra duty on each agency to obtain records of a contractor so that the records can be viewed by the public. If the records are held by the contractor, this law could be interpreted to require the agency to obtain the records from the contractor and release them to the public. *See* Wis. Stat. sec. 19.36(3).

# **Testimony to the Committee on Government Operations**

on the

## **Freedom of Information Act**

October 12, 2000

Good afternoon Chairman Patterson and members of the Committee, my name is Abdusalam Omer and I am the Chief of Staff to the Mayor. I appreciate the opportunity to come before the Council today to reiterate the Mayor's strong support for providing quality information to the public in a timely, and efficient manner. Let me begin by saying that the Mayor is in full agreement with the intent of this Committee and the authors of the Freedom of Information Act. This administration recognizes that at the foundation of a strong democracy is an open government, and that citizen inquiries and press investigations play a crucial role in maintaining a strong democracy. To support that end, we welcome this Committee as a partner in our efforts to enhance the District's capacity to respond to FOIA requests effectively.

As we discuss various issues associated with FOIA, however, it is important to recognize that there are competing social interests here. On the one hand, the public deserves access to information, but on the other hand, the government must (1) protect certain rights to privacy that might be violated by the release of information, and (2) protect the government operations and taxpayer dollars that may be diverted by some very time-consuming and resource-consuming requests for information. In other words, this is not a simple issue, and will require all of our efforts to identify new initiatives that will balance these very important and often competing social interests.

My testimony today will cover four areas. First, I will discuss how, in the eight years prior to the Williams administration, operations supporting FOIA appear to have been neglected. Second, I will identify the steps that this administration is taking to rebuild those operations. Third, I will offer some specific comments on the proposed legislation in front of the Committee. And finally, I will present the administration's vision for enhancing public access to information through FOIA in the future. I will now begin by discussing the state of FOIA operations prior to the current administration, and how we have begun the rebuilding process.

One of the most important tools for ensuring FOIA compliance is the annual report. This report documents the number of requests received, requests satisfied, time spent retrieving information, fees charged, and fees waived – all of which provide very useful information. But unfortunately, in the eight years prior to the Williams administration, we have found no evidence that this data was compiled or that this report was assembled. When the Office of the Secretary attempted to compile this information for the first year of the new administration, it became apparent that few agencies had one central point of contact for coordinating FOIA requests.

In response to these issues, the Mayor has taken two key steps. First, he issued a Mayor's Memorandum mandating the appointment of a FOIA representative for each agency. Second, he instructed the Office of the Secretary to resume the annual reporting process, which this office has done. The first report, covering the period of March 1999 through September 2000, will be published by the end of this calendar year.

Preliminary analysis indicates, however, that approximately 87 percent of FOIA requests are fully granted, with an additional 6 percent granted in part. This means that only seven percent of requests are denied, either due to confidentiality restrictions or the unavailability of the information requested.

Unfortunately, however, previous formats for data collection did not require agencies to identify the time period within which requests were granted, so the first annual report will not include data on how many requests were satisfied within the 10 day reporting requirement. As I will discuss later, however, this deficiency will be remedied for the next reporting period.

Having discussed how we got to where we are, I would now like to address a few issues associated with the proposed legislation before the Committee. Specifically, I will speak to three key concerns. First, with regard to the current 10 day limit on FOIA responses, I would like the Committee to know that the Mayor supports this aggressive requirement, even though the federal government and 50% percent of states have set this time limit at 15 days or more. Although the administration will hold all employees accountable for reaching this standard, it is unfair to make these employees criminally liable for accomplishing a task that may be out of their control. This provision may create undue anxiety for employees, and may result in a situation where they may choose to err on the side of disclosing confidential information in areas where FOIA guidelines are less than clear. Most states, 70% to be exact, recognize the problematic nature of this approach, and do not attempt to enforce FOIA through criminal penalties.

Second, while the administration agrees that contractors should be subject to FOIA in some form, this provision may create a new set of administrative and cost burdens that will exacerbate a procurement process that already involves many challenges in managing costs, administrative requirements, and delivery timelines. To account for these concerns, the administration encourages the Committee to carefully consider a thorough fiscal impact statement. The Committee should also consider the fact that the federal government and 48 states continue to exempt contractors from FOIA requirements, and the 2 states that do include contractors under FOIA do so in a very limited manner.

And finally, the requirement that all government information be available in electronic format by November of 2001 will require investments in equipment, training, and technical support for almost all agencies. To meet this requirement, most of this implementation would need to take place in FY 2001, for which the budget has already been finalized. As such, the administration encourages the Committee to carefully consider a thorough fiscal impact statement for this provision, and ensure that the appropriate time and resources are allocated to enable completion of this task.

Having discussed our improvement efforts to date, and specific issues regarding the proposed legislation, I would like to conclude by presenting several new initiatives planned by the administration for enhancing FOIA operations.

First and foremost, by the end of the calendar year, we will complete the process for appointing FOIA officers in every District agency under the

control of the Mayor. These officers will then receive training on all key aspects of FOIA, including any provisions that change due to the legislation currently under consideration.

Second, we are revising the reporting requirements from agencies to ensure that we can track our progress on not only how many requests are granted, but also the timeliness and costs associated with those efforts. As with other key areas, the Mayor is committed to including responses to FOIA requests in the performance contracts and performance evaluations of agency directors.

Third, we are exploring technology-based solutions for enhancing public access to information. We are planning enhancements to the District Government website ([www.washingtondc.gov](http://www.washingtondc.gov)) to include the names of FOIA officers, the process for submitting FOIA requests, the process for appeals, the fees that may be charged, and other useful information. We will also ensure that contact information for requests and appeals are readily available through 727-1000 and *Answers Please*. And finally, we are exploring options to process FOIA requests through a paperless correspondence tracking system, so that the status of all FOIA requests can be tracked in real time.

In closing, I want to reiterate that the Mayor is very committed to providing full and open access to government information, and to carefully balancing that goal with the need to protect citizens rights to privacy and the resources funded by taxpayer dollars.

I thank you for this opportunity to testify, and look forward to answering any questions that the Committee may have.

TESTIMONY BEFORE THE COMMITTEE ON GOVERNMENT OPERATIONS  
ON PROPOSED CHANGES TO THE FREEDOM OF INFORMATION ACT

Oct. 12, 2000

Thank you, Madam chair. I want to commend you and the committee for holding this hearing. The new agency reporting requirements in your bill, and extension of the law to cover electronic records certainly are needed improvements to the current law. These changes should enable the council to more effectively oversee and evaluate how the law is working.

But, as you may have gathered from the testimony that has preceded this panel, the biggest problem with the current Freedom of Information Act and current disclosure laws is the lack of enforcement. Strengthening the current law and enacting tougher ones won't solve the problem unless you impose hefty fines and punitive damages upon city agencies that fail to comply with the provisions of FOIA and sunshine laws. The bill under consideration here seeks to do that by imposing fines of "up to \$100" for non-compliance is no deterrent at all. But the fines need to be greatly increased to have any impact on the current conduct of D.C. FOIA officials.

Talk to any business owner, citizen activist, reporter or head of a non-profit organization in this town, and all will regale you with their horror stories of being rebuffed when trying to obtain even the most seemingly insignificant information from their government. In many instance, this information should have been handed over immediately without the need for filing an FOIA. But, during the 1980s, the mayor's office adopted the posture that all requests for information about the District should be turned down, unless disclosure was ordered by the court, because the Barry

administration wanted to maintain control over information that might put the city in a negative light. Let them sue, was the attitude prevalent among city officials during that period, and that attitude permeates the government to this day. Even well-meaning requests for such data as statistics on the health of women in the District could not be obtained without resorting to a costly court suit, because city agencies did not want to see the information they provided end up in a report stating that women in D.C. are in poor health. If you think it's going to make D.C. look bad, then don't turn it over, was the rule of thumb for complying with FOIA laws, and may still be.

Rather than take the time, trouble and expense to go to court to seek enforcement of their FOIA requests, most organizations and activists in the city have just given up. That's why you have so few FOIAs being filed.

I'll give you but one example from my own experience. In my current employment, my company often is asked to verify information about drivers and motor vehicles licensed and registered in the District for insurance and accident investigations. In many instances, the traffic accident report cannot be located because it was lost, or never filed, but that's a different story. In August of 1998, the Bureau Of Motor Vehicles suddenly stopped providing that information to licensed professionals entitled to obtain it under disclosure laws that still are on the books. The explanation we got was that the city council had changed D.C.'s privacy laws to forbid disclosure of this information. A check with the council's Judiciary Committee confirmed that no revisions of the privacy laws had been made, nor were any changes being considered. The next explanation we got from Motor Vehicle Service clerks was that the Metropolitan Police Department had ordered the change. Again, a check with the chief's office confirmed that no such order or memo existed. As

far as we could tell, the sudden halt to disclosure of vehicle registration and insurance information resulted from a nameless bureaucrat reading an article in the newspaper about a privacy bill making its way through Congress. This bureaucrat thought the privacy changes in the legislation should be the practice in D.C., and implemented these new restrictions without any regulatory or legal authority to do so. (This legislation this change was based upon, by the way, was later struck down by a federal court as unconstitutional.) After being confronted with the denials from the city council and the police chief, motor vehicle clerks curtly instructed my firm to file an FOIA to get the information, which we did.

In fact, we filed six FOIAs with Department of Public Works FOIA officer Crystal Adams during the first four months of 1998. Ms. Adams never responded to any of those inquiries, not even to acknowledge that she received them and was processing them. After the sixth one received no response, we attempted to track down Ms. Adams to see if she really existed. There was no departmental phone listing for her, and all messages for her had to be left with the main operator of DPW. I and my associates left more than a dozen messages with various DPW officials, and Ms. Adams finally called back after nearly five months. She said she had received all of our FOIAs and had dutifully forwarded them on to Motor Vehicle Services for responses. But Motor Vehicle Service officials had refused to give her the information, Ms. Adams said un-apologetically, so she couldn't answer our FOIAs. In her mind, she had complied with the law. She also explained that she worked in an office where she could not receive nor make outgoing phone calls. Therefore, she could not return the numerous phone messages left for her. After informing the general counsel's office at DPW of Ms. Adams' ludicrous excuses, she was removed as the department's FOIA officer.

I cannot report whether compliance improved after Ms. Adams' departure because by that time my clients had given up hope of obtaining this information in a timely manner. Companies factor the difficulties in getting needed information from the D.C. government into their decisions of whether to do business -- or not do business -- in the District of Columbia.

I want to propose a remedy to the problem I have just outlined. At the risk of advocating expansion of government, especially a government as unresponsive as the District's, I recommend that the council create an ombudsman's office to force compliance with FOIA and disclosure laws. If an FOIA request has not received a response within 10 days, as the law requires, then the filer can petition the ombudsman's office to take administrative action and impose fines and punitive damages for ignoring FOIA requirements.

This action should be looked upon as a matter of self defense. If you don't take such an action, the private sector soon will. The Public Interest Law Foundation is offering a \$40,000 matching grant that would be used to bring sunshine into the District government. The council must find a way to force compliance with disclosure laws before the government becomes entangled in a legal mesh of FOIA lawsuits.

Thank your for your time and consideration.

Nelson Rimensnyder

(202) 789-1581



# DOCTORS COUNCIL

of the District of Columbia

National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO

300 I STREET, N.E., SUITE 5, WASHINGTON, D.C. 20002 (202) 408-3373 FAX: (202) 408-3393

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#### *Labor Representative*

José de Arteaga

#### *Labor Relations Assistant*

Wendy S. Gray

Testimony before City Council October 12, 2000. Regarding Bill #13-829.  
"The Freedom of Information Act of 2000".

Afternoon. My name is Jose de Arteaga. I am the Labor Representative of the Doctors Council of the District of Columbia. We are the labor organization that represents the dedicated physicians, dentists and podiatrists at the District of Columbia Departments of Health, Human Services, Corrections and at the Commission on Mental Health Services. Our mission is to improve the safety-net health care delivery system here in the District. Thank you this opportunity.

The Doctors Council has a few comments and a suggestion to enhance Bill #13-829.

The District of Columbia is experiencing changes in the manner in which it delivers services to its citizens. It must also develop new and effective accountability mechanisms. A new regulatory scheme to address the new economy and service delivery for the District.

However, there continues to be a democracy deficit here in the nation's capitol. The Doctors Council hopes there comes a day when we will be able to govern ourselves. A day when the plaintiffs bar utilizes creative non-litigation forms of advocacy rather than the traditional costly court cases we have experienced at the taxpayer expense. Resources that could be used for service delivery.

Thus, the Doctors Council suggests that the following parties be covered under this bill— all Receivers, Special Masters, Trustees or any other judicially, legislatively or executive appointed or assigned supervisor or administrator of a government service or agency.

The Doctors Council on several occasions have filed information requested that have been denied in part because the Receiver or other appointed third party claims not to be covered by this act.

Please return full democracy to the District. Make these parties accountable to the public and its employees.

I am available to answer any questions.

Claudia L. McKoin  
Director  
Government Relations



Verizon Washington, DC Inc.  
1710 H Street, NW, 10th Floor  
Washington, DC 20006-4601

Phone 202.392.1312  
Fax 202.659.4948  
claudia.l.mckoin@verizon.com

October 27, 2000

The Honorable Kathleen Patterson  
Councilmember, Ward Three  
441 4<sup>th</sup> Street, N.W., Room 709  
Washington, D.C. 20001

Dear Councilmember Patterson:

Verizon Washington, DC, is submitting comments on Bill No. 13-829 "Freedom of Information Amendment Act of 2000." Verizon Washington, DC believes that the amendment expanding the definition of a public record to include private persons, firms, corporations or other private entity would negatively impact the operations of businesses in the District of Columbia. By expanding the type and nature of documents, and information to be provided, the amendments would create a costly administrative nightmare for businesses, both large and small. The criminal penalties appear to be excessive for the type of violation involved. Therefore, Verizon Washington, DC, recommends that the amendments expanding the definition of a public record, requiring the provision of information in any form or format requested and the addition of criminal sanctions be deleted from Bill 13-829. Attached are our comments supporting this position. These comments include an analysis of similar provisions in the laws of other states.

As the District Government moves to be more business friendly it must evaluate the laws, policies, procedures and regulations it establishes. The evaluation must include an assessment as to whether the action proposed is more onerous on business. The proposed amendments in Bill 13-829, are not business friendly.

Please contact me if you have any questions about our comments.

Sincerely,

A handwritten signature in cursive script, appearing to read "Claudia L. McKoin".

cc: Councilmember Ambrose Councilmember Jarvis Chairman Cropp  
Councilmember Catania Councilmember Schwartz

# **VERIZON WASHINGTON, DC**

## **Comments On**

### **Bill No. 13-829**

### **"Freedom of Information Amendment Act of 2000"**

#### **I. Introduction**

Verizon Washington, DC, ("Verizon") submits comments on Bill No. 13-829 "Freedom of Information Amendment Act of 2000." Verizon is concerned about the proposed amendments to the District of Columbia's Freedom of Information Act. Listed below are the specific issues that generate this concern:

#### **A. Expanding the Definition of Public Record**

1. Wording should be used that would restrict the application of the Act to the actual services that private entities provide on behalf of the government or when they act as or for the government. The act and its proposed amendments should not apply to companies like Verizon Washington, DC, who provide service to the District and not for or on behalf of the District.

2. Businesses do not maintain records or information in a way that would support the provision of documents to the public. The

information requested may be contained in multiple documents that are maintained at many locations.

3. Businesses do not have employees assigned to the identification, review, preparation and distribution of information to the public. Our business is to install, repair and maintain telecommunications systems. Our employees are assigned to perform these functions. Currently, governments must employ entire staffs just to respond to Freedom of Information Act (FOIA) requirements. For Verizon Washington, DC, or any other business to establish a FOIA staff would detract from the purpose of the business and significantly drive up costs.

**B. Production of Documents in any Form or Format Requested**

1. The proposed amendment to provide documents in any form or format requested by a party if the record is readily reproducible in that form or format would be unduly burdensome to businesses. In addition, the proposed amendment is counter to the purpose of the FOIA, i.e., the public disclosure of government documents already in existence. Verizon Washington, DC, maintains records to comply with the many government and regulatory filings required by law. Records are not

readily adaptable to different forms or formats. Many records are voluminous and not readily reproducible.

### **C. Criminal Penalties**

1. FOIA requires organizations to provide documents. To make noncompliance a criminal act would beg the question as to who would be arrested and put in jail from an organization. The imposition of a misdemeanor charge for those found guilty of a violation of the act is onerous and unnecessarily harsh. In addition, to make a violation of the statute criminal would only clog an already overburdened court system.

2. The current act provides for injunctive and declaratory relief along with attorney fees if the plaintiff prevails. These legal remedies would appear to be sufficient.

## **II. The Proposed Amendment Expanding the Definition of “Public Record”**

The existing D.C. Freedom of Information Act (“DCFOIA”) was passed with the belief that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. See D.C. Code §1-1521 (2000). The DCFOIA gives any person the right to inspect public records in accordance with the rules and definitions set forth in

the statute. At issue in the DCFOIA amendments is the scope of what entities are considered to be public as well as what documents should be considered public.

The current D.C. FOIA defines the term “public record” as:

all books, papers, maps, photographs,  
cards, tapes, or other documentary materials regardless  
of physical form or characteristics prepared, owned,  
used, in the possession of, or retained **by the Mayor  
and agencies**

See D.C. Code § 1-502(18) (2000) (emphasis added).

The proposed legislation would amend the definition of public record to include:

All books, papers, maps, photographs,  
cards, tapes, or other documentary materials  
regardless of physical form or characteristics  
prepared, owned, used in the possession of, or  
retained by a public body. Public records include:

(A) Information stored in an electronic format; and

**(B) Records received or maintained by a private person, firm, corporation, or other private entity in the performance or service or function for or on behalf of a public body and shall be subject to disclosure to the same extent that such records would be subject to disclosure if received or maintained by such public body.**

The result of the proposed legislation would be to extend the scope of the D.C. FOIA from the Mayor and agencies to any private person, firm, corporation, or other private entity who simply performs, services, or functions on behalf of a public body.

### **III. The Proposed Amendment Expanding the Definition of “Public Record” Creates the Danger of Misappropriation of Trade Secrets**

The proposed amendment places private corporations at a competitive disadvantage by, arguably, allowing the public to have access to its sensitive records. Justifiably, this broad authorization creates a fear in legitimate, law abiding companies that its competitors will submit a FOIA requests with the sole devious purpose of misappropriating the

company's trade secrets. To prevent this unfair and unintended result, Verizon urges that the trade secret exemption under the existing DCFOIA be retained.

The DCFOIA states that "trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained" may be exempt from disclosure under the Act. See D.C. Code §1-1524(a)(1). D.C. courts have noted that "the Act was not intended to function as a private discovery tool. . . [a]ccordingly, salutary legislation enacted in the public interest is not to be converted into a vehicle for commercial espionage." See The Washington Post Company v. Minority Business Opportunity Commission, 560 A.2d 517 (D.C. App. 1989) (discussing the trade secret exemption).

In lieu of the importance of protecting private corporations from the potential abuse of the amended FOIA, Verizon seeks to ensure that private entities will always have the ability to protect themselves under this statute.

#### **IV. The Language in the Proposed Amendment Expanding the Definition of "Public Record" Should Be Changed**

About half of the states have either instituted or enacted laws that provide for information from non-governmental agencies. Verizon

recommends changes in the language based on these time tested statutes.

A. The Majority Approach - Public Funding

One approach, taken by a majority of states, is to determine whether a private entity is subject to the act based upon the receipt or expenditure of public funds. There are many varieties regarding the language of this alternative which will be discussed in turn.

1. “in whole or in part”

Several states utilize language in their FOIA statutes to define public entity’s as “organizations or agencies supported in whole or in part by public funds, or expending public funds.” See A.R.S. § 39-121.01(A)(2) (2000) (Arizona); Ark. Stat. Ann. § 25-19-103(1) (1999) (Arkansas); N.D. Cent. Code § 44-04-17.1(12)(c) (2000) (North Dakota); 51 Okl. St. § 24A.3(2) (1999) (Oklahoma). Two other states extend the definition of public entity to include the term corporation, in addition to organizations and agencies. See S.C. Code Ann. § 30-4-20(a) (1999) (South Carolina); Tex Gov’t Code § 552.003(1)(A)(x) (2000) (Texas) (also including the term “institution”). This seems to be the ‘boiler-plate’ language in state FOIA’s. Verizon believes that this language is less severe than what is currently proposed here.

2. “involving the receipt” and “any public funding”

Three states use broad language which does not base its analysis on how much funding the entity receives from the state.

Colorado defines “public records” as those “held by any local government-financed entity for use in the exercise of functions required or authorized by law or administrative rule or **involving the receipt or expenditure of public funds.**” See C.R.S. 24-72-202(c)(a)(I) (2000) (Colorado). Illinois defines “public records” as ‘all information in any account, voucher, or contract **dealing with the receipt or expenditure of public or other funds of public bodies.**” See 5 ILCS 140/2 (c) (2000). New Mexico defines “public body” as any entity **that receives “any public funding.”** See N.M. Stat. Ann. § 14-2-6(D) (2000). Verizon recommends that such broad language as “involving,” “dealing with,” or even “that receives” should be avoided as overly broad.

3. “investment of funds”

Iowa and Pennsylvania base their definition of “public record” on the manner which public funds are invested into contracts. Iowa’s code defines “public records” as “all records relating to the investment of public funds including but not limited to investment policies, instructions, trading orders, or contracts, whether in the custody of the public body responsible for the public funds or a fiduciary or other third party.” See Iowa Code § 22.1(3) (1999). Pennsylvania

defines “public records” similarly as “[a]ny account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property . . .” See 65 P.S. § 66.1(2) (1999).

One purpose of your proposed amendments is to give citizens access to private contracts which provide services traditionally provided by the government. Under the contract language, this goal would be reached because citizens have access to records for services that the government specifically contracts out. Verizon urges that this restrictive language be incorporated into the statute.

The Delaware Freedom of Information Act adopted a hybrid approach and combined the “whole or in part” standard as discussed in Part X with the “expenditure” analysis as discussed here. The Delaware statute defines public body as any entity which (1) is supported in whole or in part by an public funds; or (2) expends or disburses any public funds, including grants, gifts, or similar disbursements and distributions; or (3) is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations. See 29 Del. C. § 10002(a) (2000). By combining these standards, the scope is very broad and Verizon urges that such a combination be avoided.

#### 4. “primarily funded”

Michigan, Virginia, and West Virginia provide examples of statutes that narrow the scope of access to records of private corporations. Instead of looking for “any” or “partial” funding, these states define public body’s as **agency’s or body’s *primarily* funded by the state**. See MCL § 15.232(2)(d)(iv) (2000) (Michigan); W. Va. Code § 29B-1-2(3) (2000) (West Virginia). Virginia makes specific reference to corporations that are supported wholly or principally by public funds. See Va. Code. Ann. § 2.1-341 (2000). By requiring that the agency receive a larger percentage of state money, less private agencies would be covered by the statute, thus narrowing the scope.

## 5. Complicated Statutes Involving Funding

### (a) Kansas

Kansas has adopted a rather complicated, but limiting, approach to the definition of public agency’s and public records. The statute defines public agency as “the state or any political or taxing subdivision of the state or any office, officer, agency or instrumentality thereof, or any other **entity receiving or expending and supported in whole or in part by the public funds** appropriated by the state or by public funds of any political or taxing subdivision of the state.” See K.S.A. § 45-217(e)(1) (1999).

Standing alone, this section sounds like the “in whole or in part” section above. However, Kansas then does something interesting. The

section immediately following states that “public agency” shall **NOT** include any entity solely by reason of payment from public funds for property, goods, or services of such entity. The statute further notes that public record shall not include records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds. A close reading of this statute would be that if the only reason the entity would be considered a public agency under the statute is if they are receiving funds, that is not enough. Furthermore, if a private corporation is receiving funds, the public would only gain access to those records which are related to the function, activity, program, or operation of said funds. This would be a good model for D.C. to follow because it limits the broad scope that receiving federal funds creates, as well as limits which records can be looked at based on their relation to the funds given to the entity.

(b) Kentucky

Kentucky defines public agency in such a way that is broad, but can be narrowly construed. Public agency is defined as “any body which derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds.” See KRS § 61.870(1)(h) (1998). While this language seems dangerously broad and in line with the “any funding” section *supra*, the statute then limits what can be inspected in a way similar to

the Kansas statute. The Kentucky statute states that public record shall **not** include any records owned or maintained by or for a body referred to in § (1)(h) (cited above) **that are not related to the functions, activities, programs, or operations funded by state or local authority**. Verizon strongly recommends that this language be included in the amended D.C. FOIA statute because it strikes a good balance between the needs of the public for information and the desire of private companies to protect their records.

## B. Minority Approaches

### 1. Private Contractor Standard

Certain states use language that defines public records to include books, papers, etc. that are developed or received by a public agency, or by a private contractor for a public agency. See Alaska Stat. §09.25.220(3) (2000). Illinois defines “public records” to include each report, document, study, or publication prepared by independent consultants or other independent contractors for the public body. See 5 ILCS 140/2(c)(xii) (2000). Missouri similarly utilizes the “enter into contract” standard in its definition of quasi-public governmental body definition. See §610.010 R.S.Mo. (4)(f) (1999) (see discussion *infra*). This is a good, narrow standard because it focuses on the information that results from the work that is contracted out by the state. This point was also discussed *supra*, Part IV.A.3.

## 2. Grants

Both Illinois and Delaware define “public records” to include information relating to any grant or contract made by or between a public body and another public body or private organization. See 5 ILCS 140/2(c)(xiv) (2000). Delaware defines “public entity” as any entity that expends or disburses any public funds, including grants, gifts, or similar disbursements and distributions. See 29 Del. C. § 10002(a). Using the grant language broadens the scope of the statute in that it is not confined to expenditures and funding. This would open up the statute to more people so Verizon urges that this language should be avoided. In both Illinois and Delaware, the funding section was in addition to a section strictly discussing government expenditures.

## 3. “acting on behalf of”

Rhode Island and Florida utilize similar language to define “agency” under their acts allowing access to public records. The definition includes any “public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency. Fla. Stat. § 119.011(2) (2000). The Rhode Island statute includes any agency acting on “behalf of and/or **in place of** any public agency.” See R.I. Gen. Laws § 38-2-2(1) (2000) (emphasis added). Verizon cautions against using such language. These statutes specifically discuss private

partnerships and corporations, and the language “on behalf of” or “in place of” is overbroad and subject to different interpretations.

#### 4. Budget Review or Audit

Indiana is the only state which defines public entity or office in terms of budget review or audit. See Burns Ind. Code Ann. § 5-14-3-2 (2000). The code defines public agency as any entity or office that is subject to budget review by either the state board of tax commissioners or the governing body of a county or city **or** an audit by the state board of accounts. This seems to be a rather unclear standard that I would suspect to be full of loopholes and ambiguity. A more thorough analysis of who would be subject to such reviews or audits would indicate just how broad or narrow this standard is.

#### 5. Quasi-public Governmental Bodies

Both Louisiana and Missouri incorporate into their public records statutes the term “quasi-public governmental bodies.” Missouri defines the term as any person, corporation or partnership authorized to do business in the state or unincorporated association which either (a) has its primary purpose to enter into contracts with public governmental bodies, or to engage primarily in activities carried out pursuant to an agreement or agreements with public governmental bodies **or** (b) which performs a public function through the allocation of tax credits, tax

abatement, public debt, tax-exempt debt, rights of eminent domain, or the contracting of leaseback agreements on structures whose annualized payments commit public tax revenues; or any association that directly accepts the appropriation of money from a public governmental body, but only to the extent that a meeting, record, or vote relates to such appropriation.

Louisiana defines quasi-public nonprofit corporation more simply as an entity that performs a governmental or proprietary function. See La. R.S. 44:1 (A)(1) (2000).

The use of this term in the statute would result in several layers of analysis to determine who would be covered. First, there would need to be an analysis of what a “primary purpose” to fit into the first prong. For the second prong, though the standard is simply the appropriation of money, the access to records is limited to such appropriation. Though this statute is slightly more complicated than the proposed statute, it does an excellent job narrowing down the number of private entities that would be subject to FOIA.

## 6. Georgia

D.C.’s proposed FOIA seems to be substantially similar to Georgia’s statute for the inspection of public records. The language regarding private persons, firms, corporations, or other private entities is more or less identical. Out of all of the states that have adopted

provisions that extend the FOIA to records of private corporations, Georgia is the **only** state that has such language. Therefore, D.C. would be in the minority and the proposed amendments should be altered to be in concert with the approach of the majority of states.

#### 7. The Federal FOIA

Finally, it should be noted that the federal FOIA does not include private corporations or public funding of private corporations in its statute. See 2 U.S.C.A. §551(1).

### **V. Conclusion**

The prevention of misappropriations of trade secrets is a critical concern of private corporations who compete in the marketplace. While we readily acknowledge the right and necessity of public access to public information, at the same time we, and others, ask the public to respect our rights as private entities not to have proprietary information available to our competitors for the asking. Nearly all jurisdictions have respected this principle and enacted public access with reasonable balances of interests.

The Council of the District of Columbia is urged to retain this critical element of the existing FOIA to protect corporations from those

who would abuse the grant of access merely to obtain a competitive advantage.

The language of your proposed amendment should be modified to narrow the scope of private entities who will be subject to FOIA. The most common methodology used to incorporate private entities is to use **funding** as a criteria for access to records. Verizon would recommend using language that requires the entities be **primarily funded by the government**, and not use the **in whole or in part** language. Verizon definitely does not recommend using such broad language as **involving the receipt of or receiving any public funding** or defining agency's as those that **act on behalf of or in place of any public agency**.

Verizon would also discourage the use of **grants** as a criteria for access to public records for fear it may be too broad. The use of **budget reviews or audits** may prove to narrow the scope, but it must be determined first who would be affected. Using the term **quasi-public governmental bodies** may prove to be helpful in the sense that it would create additional analysis as corporations seek to comply or not comply with this made-up term, further narrowing the scope.

Verizon recommends using language that limits the scope to **funds used for specific contracts**. This way, your goal of giving citizens access to private contracts which provide services traditionally provided by the government would be met. Verizon especially urges that language

be added to the statute to **limit access to the records directly related to the amount of funding.**

Verizon cautions against using language that makes the statutes both long and all encompassing. If a lengthy statute were to be adopted, it should be modeled after those in Kansas or Kentucky. These statutes begin broadly, but then narrow their scope to protect a private company's competitive interests.

We trust that you will find these comments to be helpful. The adjustments that we discuss and seek are very important to the interests of this District of Columbia corporate citizen.

**ATTACHMENT H**

A BILL

13-829

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

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To amend the District of Columbia Administrative Procedure Act, to provide for disclosure of records in electronic format, to extend coverage to the Council and private contractors performing public functions, to provide disclosure requirements for partially released documents, to clarify categories of information that do not require a written request for information, to provide penalties for arbitrary or capricious violations of the act, to revise the annual reporting requirements, to provide a training requirement for Freedom of Information Officers; and to amend the District of Columbia Public Records Management Act of 1985 to provide new guidelines for the maintenance and disposal of records filed with the Office of Campaign Finance.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Freedom of Information Amendment Act of 2000."

Sec. 2. Section 3 of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1203; D.C. Code § 1-1502), is amended as follows:

(a) Paragraph (18) is amended to read as follows:

"(18) The term "public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used in the possession of, or retained by a public body. Public records include information stored in an electronic format."

(b) A new paragraph (18A) is added to read as follows: 1

"(18A) The term "public body" means the Mayor, an agency, or the Council of 2  
the District of Columbia." 3

Sec. 3. Title 2 of the District of Columbia Administrative Procedure Act, effective 4  
March 25, 1977 (D.C. Law 1-96; D.C. Code § 1-1521 *et seq.*), is amended as follows: 5

(a) Section 201 (D.C. Code § 1-1521) is amended by striking the phrase "Generally the" 6  
and inserting the word "The" in its place. 7

(b) Section 202 (D.C. Code § 1-1522) is amended as follows: 8

(1) By striking the phrase "the Mayor or an agency", the phrase "Mayor or agency", and 9  
the phrase "the agency" wherever they appear and inserting the phrase "a public body" in their 10  
place. 11

(2) New subsections (a-1), (a-2), and (a-3) are added to read as follows: 12

"(a-1) In making any record available to a person pursuant to this section, a public 13  
body shall provide the record in any form or format requested by the person, provided that the 14  
person shall pay the costs of reproducing the record in that form or format. 15

"(a-2) In responding to a request for records pursuant to this section, a public 16  
body shall make reasonable efforts to search for the records in electronic form or format, except 17  
when the efforts would significantly interfere with the operation of the public body's automated 18  
information system. For purposes of this section, "search" means to review manually or by 19  
automated means, public records for the purpose of locating those records which are responsive 20  
to a request, and "reasonable efforts" shall not require a public body to expend more than 8 hours 21  
of personnel time to reprogram or reformat records. 22

"(a-3) A public body shall make available for inspection and copying any record produced or collected pursuant to a contract with a private contractor to perform a public function, and the public body with programmatic responsibility for the contractor shall be responsible for making such records available to the same extent as if the record were maintained by the public body."

(c) Section 203 (D.C. Code § 1-1523) is amended as follows:

(1) Subsection (a) is amended by striking the phrase "the Mayor or an agency" and inserting the phrase "a public body" in its place.

(2) Subsection (b) is amended by striking the phrase "The Mayor and each agency of the District of Columbia" and inserting the phrase "Each public body" in its place.

(d) Section 204(b) (D.C. Code § 1-1524(b)) is amended to read as follows:

"(b) Any reasonably segregable portion of a public record shall be provided to any person requesting the record after deletion of those portions which may be withheld from disclosure pursuant to subsection (a) of this section. In each case, the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (a) of this section under which the deletion is made. If technically feasible, the extent of the deletion and the specific exemptions shall be indicated at the place in the record where the deletion was made."

(e) Section 206 (D.C. Code § 1526) is amended to read as follows:

"INFORMATION WHICH MUST BE MADE PUBLIC

"Sec. 206. (a) Without limiting the meaning of other sections of this title, the following

categories of information are specifically made public information, and do not require a written	1
request for information:	2
"(1) The names, salaries, title, and dates of employment of all employees and officers of a	3
public body;	4
"(2) Administrative staff manuals and instructions to staff that affect a member of the	5
public;	6
"(3) Final opinions, including concurring and dissenting opinions, as well as orders, made	7
in the adjudication of cases;	8
"(4) Those statements of policy and interpretations of policy, acts, and rules which have	9
been adopted by a public body;	10
"(5) Correspondence and materials referred to therein, by and with a public body, relating	11
to any regulatory, supervisory, or enforcement responsibilities of the public body, whereby the	12
public body determines, or states an opinion upon, or is asked to determine or state an opinion	13
upon, the rights of the District, the public, or any private party;	14
"(6) Information in or taken from any account, voucher, or contract dealing with the	15
receipt or expenditure of public or other funds by public bodies;	16
"(7) The minutes of all proceedings of all public bodies;	17
"(8) All names and mailing addresses of absentee real property owners and their agents.	18
"Absentee real property owners" means owners of real property located in the District that do not	19
reside at the real property;	20
"(9) Copies of all records, regardless of form or format, which have been released to any	21
person under this act and which, because of the nature of their subject matter, the public body	22

determines have become or are likely to become the subject of subsequent requests for  
substantially the same records; and

"(10) A general index of the records referred to in section 206(a), unless the materials are  
promptly published and copies offered for sale.

"(b) For records created on or after November 1, 2001, each public body shall make records  
available on the internet or, if a website has not been established by the public body, by other  
electronic means."

(f) Section 207 (D.C. Code §1-1527) is amended as follows:

(1) The second sentence of subsection (b) is amended by striking the phrase "Mayor or  
the agency" and inserting the phrase "public body" in its place.

(2) New subsections (d) and (e) are added to read as follows:

"(d) Any person who commits an arbitrary or capricious violation of the  
provisions of this title shall be guilty of a misdemeanor and upon conviction shall be punished by  
a fine not to exceed \$100.00. A prosecution under this section may only be commenced by the  
issuance of a citation, which shall be personally served upon the defendant. The defendant shall  
not be arrested prior to the time of trial, except that a defendant who fails to appear for  
arraignment or trial may be arrested pursuant to a bench warrant and required to post a bond for  
his or her future appearance.

"(e) All employees of the government of the District of Columbia are responsible  
for compliance with the provisions of this title, and this requirement shall be incorporated in  
Section 1803 of the District of Columbia Personnel Regulations."

(g) Section 208 (D.C. Code §1-1528) is amended to read as follows:

"(a) On or before February 1 of each year, the Mayor shall request from each public body and submit to the Council a report covering the public-record-disclosure activities of each public body during the proceeding fiscal year. The report shall include:

"(1) The number of requests for records received by the public body and the number of requests processed;

"(2) The number of determinations made by each public body not to comply with requests for records made to the public body pursuant to this title and the reasons for each determination;

"(3) The number of requests for records pending before the public body as of September 30 of the preceding year, and the median number of days that the requests had been pending before the public body as of that date;

"(4) The number of appeals made pursuant to section 207(a), the result of the appeals, and the reason for the action upon each appeal that results in a denial of information;

"(5) The number of employees found guilty of a misdemeanor pursuant to section 207(d);

"(6) The median number of days taken by the public body to process different types of requests, and the number of requests processed within 10 days, the number of requests processed between 11 and 20 days, and the number of requests processed in 21 days or more;

"(7) The total amount of fees collected by the public body for processing requests; and

"(8) The number of hours that staff devoted to processing requests for

records pursuant to this section, and the total amount expended by the public body for processing these requests.

"(9) A qualitative description or summary statement, and conclusions drawn from the data regarding compliance with this title.

"(b) The Mayor shall make these reports available to the public on the Internet or by other electronic means.

"(c) The Corporation Counsel shall submit an annual report on or before February 1 of each calendar year which shall include for the prior fiscal year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the costs assessed pursuant to section 207(c).

"(d) Each public body subject to the provisions of this title shall designate a Freedom of Information Officer. As of November 1, 2001, the Mayor shall provide to these officers on their appointment a minimum of 8 hours of training regarding implementation and compliance with this title."

Sec. 4. Section 602 of the District of Columbia Campaign Finance Reform and Conflict of Interest Act, approved August 14, 1974 (88 Stat. 467; D.C. Code § 1-1462), is amended as follows:

(a) Subsection (c) is amended by striking the last two sentences and inserting the following sentence in its place.

"The Director shall dispose of papers filed pursuant to this section in accordance with the District of Columbia Public Records Management Act of 1985, effective September 5, 1985 (D.C. Law 6-19; D.C. Code § 1-2901 *et seq.*)".

(b) Subsection (d) is amended by striking the last two sentences and inserting the following sentence in its place.

"The Director shall dispose of papers filed pursuant to this section in accordance with the District of Columbia Public Records Management Act of 1985, effective September 5, 1985 (D.C. Law 6-19; D.C. Code § 1-2901 *et seq.*)."

Sec. 5. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Code § 1-233(c)(3)).

Sec. 6. This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), approval by the Financial Responsibility and Management Assistance Authority as provided in section 203(a) of the District of Columbia Financial Responsibility and Management Assistance Act of 1995, approved April 17, 1995 (109 Stat. 116; D.C. Code § 47-392.3(a)), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Code § 1-233(c)(1)), and publication in the District of Columbia Register.

**COUNCIL OF THE DISTRICT OF COLUMBIA  
OFFICE OF THE BUDGET DIRECTOR**

**FISCAL IMPACT STATEMENT**

Bill Number: 13-829	Type: Emergency ( ) Temporary ( ) Permanent (X)	Date Reported: October 31, 2000
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Subject/Short Title:  
"Freedom of Information Amendment Act of 2000"

**Part I. Summary of the Fiscal Estimates of the Bill**

	<b>YES</b>	<b>NO</b>
1. It will impact spending. (If "Yes," complete Section 1 in the Fiscal Estimate Worksheet).	( )	(X)
a) It will affect local expenditures.	( )	(X)
b) It will affect federal expenditures.	( )	(X)
c) It will affect private/other expenditures.	( )	(X)
d) It will affect intra-District expenditures.	( )	(X)
2. It will impact revenue. (If "Yes," complete Section 2 in the Fiscal Estimate Worksheet).	( )	(X)
a) It will impact local revenue.	( )	(X)
b) It will impact federal revenue.	( )	(X)
c) It will impact private/other revenue.	( )	(X)
d) It will impact intra-District revenue.	( )	(X)
3. The bill will have NO or minimal fiscal impact. (If "Yes," explain below).	(X)	( )

**Explanation:**

Bill 13-829 will not have any impact on the FY 2001 budget because it amends the Freedom of Information Act disclosure requirements. The amendments provide for disclosure of electronic documents and disclosure requirements for partially released documents, clarify categories of information that do not require a written FOIA request, provide penalties for violations of the act, revise the annual reporting requirements, and provide guidelines for maintenance and disposal of records filed with the Office of Campaign Finance. The legislation also extends coverage of the act to private contractors performing government functions, but the government agencies with oversight responsibility for the contractors are responsible for compliance with the law, and these agencies already have FOI officers appointed to them. Therefore, contract costs should not increase as a result of the legislation, and no additional costs should be imposed upon the contractors. Additionally, Bill 13-829 extends coverage to interstate compact agencies and the Council, but these government agencies should appoint FOI officers as the executive branch has done by adding this responsibility to an existing staff member's responsibilities. Two aspects of the proposed legislation will have a fiscal impact in FY 2002 and out years, including the requirement for a minimum of 8 hours of training for FOI officers and the requirement to put certain categories of information online. The Office of the Chief Financial Officer is preparing a fiscal impact statement for these requirements, but neither requirement will take effect until November 1, 2001. Therefore, there will be no fiscal impact on the FY 2001 budget, and the effective date provides ample time for the FY 2002 budget to accomodate any increase in cost.

## Part II. Other Impact of the Bill

If you check "Yes" for each question, please explain on separate sheet, if necessary.

- |  | YES | NO  |
|--|-----|-----|
| 1. It will affect an agency and/or agencies in the District.<br>Bill 13-829 will affect every agency in the District by changing the disclosure requirements of the Freedom of Information Act. It will especially affect the Council, WMATA and other interstate compact agencies, and private contractors who were not previously subject to the act. Also, there is one provision that applies specifically to the maintenance and disposal of records at the Office of Campaign Finance. | (X) | ( ) |
| 2. Are there performance measures/output for this bill?<br>Every public body is required to submit an annual report that covers its public-disclosure-activities, and the Mayor shall submit these reports to the Council.   | (X) | ( ) |
| 3. Will it have results/outcome, i.e., what would happen if this bill is not enacted?<br>The desired outcome of this legislation is to promote public access to information regarding government affairs.  | (X) | ( ) |
| 4. Are funds appropriated for this bill in the Budget and Financial Plan for the current year?<br>No additional funds are necessary in FY 2001. See explanation above.   | ( ) | (X) |

Sources of information:

Committee on Government Operations research,  
Public Hearing held on October 12, 2000

Councilmember: Kathy Patterson

Staff Person & Tel: Katherine Mills, 724-7758

Council Budget Director's Signature:

*Arthur S. Harris* 10/12/00